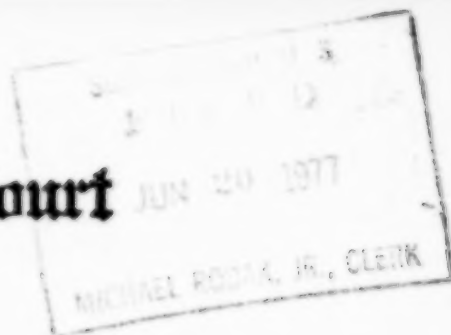


In the Supreme Court

OF THE
United States



OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW, *Petitioner,*

vs.

STATE OF GEORGIA, *Respondent.*

ON WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

Brief Amicus Curiae of Citizens for Decency
Through Law, Inc., in support of the respondent
State of Georgia.

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Brief Amicus Curiae of Citizens for Decency
Through Law, Inc., in support of the respondent
State of Georgia.

Interest of Amicus Curiae.

Citizens for Decency through Law, Inc.,
(short title C.D.L., formerly Citizens for Decent
Literature Inc.) an Ohio Corporation, with local
affiliates throughout the United States, is a
non-profit, non-sectarian and non-political cor-
poration with national headquarters in Cleveland,
Ohio, formed for and dedicated to the support
of this nation's obscenity laws by cooperating

with law enforcement in the enforcement of the obscenity laws.^{1/}

CDL's interest as amicus curiae on behalf of the Respondent State of Georgia lies in its concern: (1) that the decision of the Georgia Court of Appeals, upholding Ballew's criminal obscenity conviction and jail sentence of one year, should be affirmed on the merits, and (2) that, in fulfilling its historic responsibility as the "custos morum" of this nation, the majority of this Court should speak out against the type of hard-core pornography, herein under consideration, to the fullest extent possible within the framework of this appeal.

Amicus submits that this Court, in its review of the film "Behind the Green Door" should take advantage of the opportunity presented in this case to publish the fact that such film is the type of "hard-core" obscenity which is unlawful under federal as well as state obscenity standards. See Smith v. U.S. __ U.S. __, 52 LEd2d 324, 337, 97Sct __ (May 23, 1977). A personal acknowledgment of this order is sorely needed

^{1/} The written consents of the petitioner and the respondent have been requested under Rule 42.2 and both parties have consented in writing. Copies of such consents are being filed with this Court, concurrently with this Amicus Curiae Brief.

at the present time, to serve as a measure of encouragement^{2/} for those state and federal prosecutors who were disillusioned by this Court's perfunctory "remand" orders in June of 1973. Contrary to what the majority of this Court must have intended, the Miller et al. decisions have

^{2/} It is an unfortunate fact of life that this Court is really only "heard" when it speaks through its formal written opinions. During the 1974 and 1975 October Terms, this Court had before it for review two other criminal obscenity convictions from the State of Georgia, involving the same Georgia obscenity statute and two equally notorious "hard-core" films. Dyke v. State of Georgia ("Devil in Miss Jones") 232 Ga 817, 209 S.E.2d 166 (Sept. 24, 1974) and Sanders v State of Georgia ("Deep Throat") 234 Ga 586, 216 S.E.2d 838 (June 2, 1975). This Court's action in those cases was to simply deny certiorari. See Dyke v. State of Georgia 421 U.S. 952, 44 LEd2d 106, 95 Sct 1687 (April 28, 1975) and Sanders v. State of Georgia, 424 U.S. 931, 47 LEd2d 340, 96 Sct 1145 (February 23, 1976), rehearing denied in 425 U.S. 945, 48 LEd2d 189, 96 Sct 1687 (April 19, 1976). Amicus submits that had the majority of this Court granted plenary review of those cases and considered the "contraband" nature of such films, it would have done more to solve this nations's present "hard-core" problem than was accomplished by all of this court's obscenity opinions during the past five terms of court. It would have had the additional positive value of requiring dissenting Justices Brennan, Stewart, and Marshall to justify their defense of "obscenity" in the light of the autoptical evidence rather than in the abstract.

not provided the spark which would ignite law enforcement efforts and bring about a curtailment of this nation's obscenity problems.

Indeed, the psychological effect resulting from this Court's remand of 50 of such cases has brought about the opposite result.^{3/}

The film "Behind the Green Door" is a part of the outfall created by the indecisive manner in which the majority of this Court dealt with the obscenity problem during the 1972 October Term. In San Francisco, where the producers of "Behind the Green Door" are located, District Attorney Ferdon dismissed more than 200 pending obscenity cases following the Miller remands. Both he and his successor have abandoned efforts to enforce the obscenity statutes in that area. Concurrently, the San Francisco based producers of "Behind the Green Door" graduated from their former business of producing porno shorts and made the transition to full length porno features, five of which (including the film "Behind the Green Door") have received copyright certificates from the Copyright Office of the Library of

^{3/} See New York University Law Review, vol. 52, No. 4 (publication date Dec. 1977), "The Effect of Miller v. California: an Empirical Analysis", as reported in the Los Angeles Daily Law Journal on April 1, 1977.

Congress.^{4/}

In several brief opinions during the past term, dissenting Justice Paul Stevens has suggested to the majority that the "criminal enforcement of obscenity law" has outlived the usefulness it has enjoyed during the two hundred years of this nation's existence, and has advanced an unorthodox opinion that "However distasteful these materials are to some of us, they are nevertheless a form of communication and enter-

^{4/} By title, those films are: "Behind the Green Door", "Resurrection of Eve", "Sodom and Gomorrah", "Inside Marilyn Chambers", and "Autobiography of a Flea". All are unadulterated hard-core pornography. A certified copy of the Copyright Office of the Library of Congress Certificate of Registration of a Claim to Copyright in a Motion Picture, Registration No. MP 24594, Class L-M, applied for on November 8, 1973 and issued for the film "Behind the Green Door" is attached to this Brief at Appendix "B". In an unreported decision in Mitchell Brothers Film Group v. Cinema Adult Theater, et al., in the U.S. District Court for the Northern District of Texas, CA-3-74-645-D, a copy of which is attached to this Brief at Appendix "C", the U.S. District Court on September 2, 1976 held such film to be obscene under federal standards and not entitled to copyright protection. That case is presently on appeal. Amicus submits that this incredible development in the copyright area can be short circuited through the simple expediency of this Court's reviewing the film "Behind the Green Door" in the light of federal standards and declaring it to be what it clearly is---hard-core pornography (hence, uncopyrightable).

tainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace . . . " Marks v. U.S. ___ U.S. ___ 51 LEd2d 260, 269 97 Sct ___ (March 1, 1977). Amicus respectfully submits that Justice Stevens' brief remarks were made without a thorough analysis and complete probe to the heart of this Court's problem. To suggest that government should capitulate because the problem has not been solved, but has only grown worse, is to admit defeat without an investigation of the cause for such defeat. We submit that a more judicious approach would involve a re-examination of what has been done in the past, to search for possible errors which this court might have sponsored. Such a probe would necessitate an examination of the performance of those justices who, as the "custos morum" of this nation, took part in the judicial process during the 20 years prior to Justice Stevens' appointment to the bench, and whose value judgments, right or wrong, have been a concomitant part of this present problem involving the proliferation of hard-core pornography.

As applied to the present claims which are being asserted in defense of the hard-core film, "Behind the Green Door", a number of nagging questions present themselves in retrospect, such

as, (1) whether this Court did not commit fundamental error in its judgment in 1964 when it rejected the rationale and equitable principles espoused by the Ohio Judiciary in its almost unanimous opinion in Ohio v. Jacobellis: "Lex Citius Tolerare Vult Privatum Damnum Quam Publicum Malum (The law will rather permit a private loss (or damage) than a public evil)." See also, the rationale applied by the New York Court of Appeal in the civil lawsuit Trans-Lux Dist. Corp. v. Bd of Regents ("A Stranger Knocks") 248 N.Y.S. 2d 857, 863 (March 26, 1964):

"To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

which was undercut during the following term by this Court's summary action in Trans-Lux Dist. Corp. v. Bd. of Regents 380 U.S. 259 (March 15, 1965). Still another nagging question was raised by Justice Stevens himself in Marks, supra, at page 260, where he states that the dictum first suggested in Stanley v Georgia 394 U.S. 557, 22 LEd2d 542, 89 Sct 1243, (April 7,

1969), that a person "has a constitutional right to possess obscene matter" necessarily requires the "illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess." For a differing view which does not require the "illogical premise" which Justice Stevens envisions, and which, consistent with Stanley v. Georgia, supra, asserts, in a civil lawsuit context, the non-existence of any right to possess "contraband", see the Wisconsin Supreme Court speaking in Wisconsin v. Voshart 39 Wisc2d 419, 159 N.W.2d 1 at 9 (June 7, 1968).

It is not irreverent to suggest that a re-evaluation of what has transpired in the past 20 years would demonstrate that had this Court not broken with tradition and rejected the moral judgments of the highest courts in Ohio (Jacobellis) and New York (Trans-Lux), which held that explicit sexual intercourse was not a fit subject for entertainment on the public motion picture screen, and had it expressly qualified the dictum of Stanley, supra, by an application of the Voshart principle, the hard-core inundation which now faces this nation, at the advent of its third century of existence, would never have come into being - - not in three hundred years.

OPINIONS BELOW

The decision of the Court of Appeals of Georgia is reported in Claude D. Ballew v. State of Georgia, 138 Ga.App. 530, 227 S.E.2d 65 (Apr. 6, 1976). On May 6, 1976 the Court of Appeals denied a rehearing, and on July 9, 1976 the Georgia Supreme Court denied a writ of certiorari. Copies of the opinion of the Court of Appeals and the other orders denying a rehearing and writ of certiorari are attached to this Brief at Appendix "A".

QUESTIONS PRESENTED

1. Whether a jury composed of five persons is sufficient to afford an accused in a criminal prosecution to the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether a standard of scienter which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of expression protected under the First and Fourteenth Amendments to the United States Constitution.

3. Whether the motion picture film "Behind

the Green Door" is, as a matter of applicable constitutional law, protected expression under the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On November 9, 1973, two Investigators for the Office of the Solicitor General for the Criminal Court of Fulton County went to the Paris Art Theatre located in Fulton County, Georgia. The film "Behind the Green Door" was advertised by title on the marquee. Both Investigators were experienced in the criminal prosecution of obscene materials.

After paying a consideration, they entered the theatre and viewed the motion picture film entitled "Behind the Green Door". After viewing the film, the Investigators obtained a search warrant. The warrant was served on the same day (November 9, 1976) and the film was seized as evidence after it had again been viewed to make sure it was the same film.

The Appellant, Claude D. Ballew, and a Mr. Pace, who is not a party here, were present at the theatre both at the time of the first viewing and at the time of the execution of the search warrant. The Investigators bought a ticket from Mr. Pace, and the Appellant Ballew, standing with

Mr. Pace behind the cash register, pushed the button to unlock the door into the theatre proper. At the time the warrant was served, Mr. Pace was at the cash register and Appellant Ballew was in the projection room. Following the arrest of both parties, Appellant Ballew checked the cash register and locked the door to the theatre.

A commitment hearing as to the first arrest was waived on November 26, 1973. On November 26, 1973, after the waiver of the commitment hearing, the same Investigators visited the Paris Adult Theatre to see if the same film was playing. "Behind the Green Door" was still on the marquee.

The Investigators then entered the theatre to view the film, and the Appellant Ballew and Mr. Pace were again present. When the Investigators tried to buy a ticket from Mr. Pace, he asked Appellant Ballew to take the money. Appellant Ballew told Mr. Pace to accept because "You're the cashier." But Mr. Pace protested and stated (to Ballew) "But you're the manager," or "You run the place." Appellant Ballew finally took the money.

The film showing on November 26th was identical to the film shown on November 9th. After viewing the film, the Investigators obtained another search warrant. When this search

warrant was executed on November 27th, Appellant Ballew and Mr. Pace were again present. Both were arrested for the second time and Appellant Ballew again locked the theatre.

A two count accusation was filed alleging a violation of Ga. Code Ann. 26-2101 on two specified dates, the dates being essential averments to the transactions.

Trial was begun on May 22, 1975 and the jury returned a verdict of guilty. A motion for new trial was filed and, after being heard, was overruled on September 29, 1975. On April 6, 1976, the conviction was affirmed by the Court of Appeals of Georgia, and on July 9, 1976, the Supreme Court of Georgia denied certiorari.

SUMMARY OF ARGUMENT

I

The Sixth Amendment Right to Trial by Jury as applied to the States through the Fourteenth Amendment does not prevent the State of Georgia from adopting a procedure which provides for the trial of misdemeanor criminal cases to a jury of five persons.

The criminal procedure employed by the trial court below is authorized by the Georgia Constitution and Georgia Statutes. The Georgia constitution authorizes the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the Superior Court where twelve jurors are mandatory.

The Criminal Court of Fulton County is a court of limited jurisdiction which may only try misdemeanors. By statute, only five jurors are required for the trial of such cases. Jury verdicts in the criminal court of Fulton County must be unanimous as they must be in all Georgia county courts.

In Williams v. Georgia, this Court held during the 1969 October Term that a six-man jury was constitutionally acceptable in state trials in the Sixth and Fourteenth Amendments.

In an appendix to Justice Harlan's concurring opinion in Williams, reference was made to the Georgia criminal procedure which authorized a jury of five in criminal misdemeanor cases in the criminal court of Fulton County. In its majority opinion in Williams, this court pointed out at footnote 28 on page 91, with reference to Justice Harlan's opinion, that:

"We have no occasion in this case to determine what minimum number can still constitute 'jury', but we do not doubt that six is above that minimum."

Since "six" was above the minimum, it must necessarily follow that a jury of one less number (5) must be within the minimum number.

During the 1971 Term of court, this court's decision in Johnson v. Louisiana, 406 U.S. 356, had occasion to examine in the context of an equal protection claim, the Louisiana criminal procedure which authorized a jury of five persons and which required a unanimous verdict. The majority of the Court in Johnson cited with approval its previous holding in Williams v. Florida for the proposition that states are free to try defendants with juries of less than twelve persons. The Johnson Court also stated that the question of whether the burden of proof by the state should be the

verdict of nine out of twelve jurors, or a unanimous verdict of five jurors, was a matter of the judgment of the Louisiana legislature.

During the 1975 October Term of Court, this Court had before it the identical issue in Sanders v. State of Georgia, 75-707 in a Petition for a Writ of Certiorari which was filed by the attorneys of record herein. In Sanders the Georgia Supreme Court had upheld the constitutionality of the Georgia five-man jury. The Petition for Writ of Certiorari was denied by a majority of this court in Sanders v. State of Georgia, 424 U.S. 931. A Petition for Rehearing was also denied in 425 U.S. 945.

Petitioner's argument that the decrease in size of jury from six persons to five persons has the effect of making such a jury's verdict on "community standards" a constitutionally infirm determination, loses its vitality when considered in the light of this court's ruling on similar matters in Johnson v. Louisiana. Relative to the certainty of proof on the trial issues, as effected by the size of the jury, this court pointed out that it was sufficient for constitutional purposes that the agreement of only nine of twelve jurors be reached for conviction, in a criminal case on the issue "beyond a reasonable doubt", and that in such

a case the vote of three jurors for acquittal did not impeach the verdict of the other nine. The Johnson Court pointed out that the fact that only nine agreed on the issue did not demonstrate that the conviction was based on a lower standard proof.

It should be noted that in Johnson, the appellant made the opposite argument to that being made here, that is that it was easier to convince nine out of twelve persons on a twelve-man jury than to convince all five on a five-man jury. This Court's comment was that, in any event, it was a matter for the judgment of the legislature.

An argument that, by lessening the number of jurors which are available for deliberation the deliberation on community standards will suffer, is faced with a counter-argument that smaller groups stimulate discussion, and that cases where the juries are required to apply their personal knowledge as a basis for determining contemporary community standards, accurate decisions depend upon jury participation and full discussion. Studies indicate that the larger groups tend to inhibit discussion, and that more active participation by all members is achieved as a result of the reduction of number in the jurors.

Even were one to concede that the petitioner's argument may have some validity in cases where no evidence was offered, other than the subject matters itself, that situation is under the control of the parties to the action who may, at their election, choose to introduce additional evidence for the jury's consideration on the "contemporary community standards".

II

The jury instructions on "scienter" comply with the constitutional requirements set by this court. Petitioner's arguments which focus on one sentence of the jury instruction, are faulty for 2 reasons: (1) the petitioner's analysis of that portion of the instruction fails to accord to the language of that challenged sentence the interpretation to which it is entitled under the constitutional principles established in Hamling v. U.S., 418 U.S. 87, and (2) such challenge fails to consider the instructions on the "scienter" issue as a whole, and in their relation to the charge, and to the evidence produced at the trial.

Petitioner's objection to the jury instruction on "scienter" is based upon certain language taken from the most recent pronouncement of

this court on "scienter" in Hamling v. U.S., supra at page 123. Petitioner's contention that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the material distributed, is clearly an incorrect reading of Hamling. That argument fails to take into account the paragraph in Hamling which immediately precedes the paragraph upon which petitioner has based his argument. The preceding paragraph in Hamling refers to this Court's decision on "scienter" in Ginsberg v. New York, 390 U.S. 629 which the Hamling Court reaffirmed. By reaffirming, the court approved the language in Ginsberg reading "knowingly" was defined in the statute as "knowledge" of, or "reason to know" of the character and content of the materials." The word "knew" in the paragraph which followed in Hamling, upon which petitioner relies, really includes "reason to know" as was explained by the Hamling Court in the preceding paragraph in its approval of the language in Ginsberg v. New York. The "reason to know" language approved in Ginsberg v. New York and Hamling v. U.S. is the equivalent of the prosecutorial burden "should have had knowledge", upon which petitioner bases his entire objection herein.

Subjective knowledge is clearly not the constitutional requirement for "knowledge". On the contrary, the defendants conviction must stand even though the jury may be satisfied that subjectively, the defendant exhibited the film without knowing the obscene nature thereof.

To properly interpret the Petitioner's basis for his attack on the jury instructions, requires an analysis of the "state of mind" spectrum which may exist "subjectively" in any person who exhibits a motion picture film which is obscene as a matter of fact. Degrees of a person's subjective "knowledge of the fact" and "knowledge contrary to the fact" are analyzed by Professor Rollin M. Perkins in his text "Perkins on Criminal Law, Foundation Press, Second Edition, page 775" and "Perkins, A Rationale of Mens Rea, 52 Harvard Law Review 905 (1939). Five categories are discussed. Drawing upon Professor Perkins' analysis, the meaning of "knowledge" as it relates to the "scienter" requirement for the obscenity crime can be similarly diagrammed. In general, those categories are as follows: (1) guilty knowledge, (2) guilty belief which is correct, (3) guilty avoidance of knowledge, (4) bona-fide belief contrary to fact, resulting from negli-

gence (either criminal or ordinary), and (5) bona-fide belief contrary to fact, based upon reasonable grounds - honest mistake.

The "scienter" requirements came into the law through Justice Brennan's opinion in Smith v. California, 361 U.S. 147. In that case, the Smith court had occasion to refer to the California statute which it discussed in its prior opinion in California v. Alberts, 354 U.S. 495. The court in Smith said "The General California Obscenity Statute, Penal Code Section 311 requires "scienter", note 3, and was, of course sustained by Roth v. U.S.". An examination of the "scienter" provision of section 311 shows that it had been interpreted by the appellate courts in California as follows: "A defendant is not guilty of violating Penal Code section 311 unless he had knowledge of the character of the material. People v. Wepplo, supra, 947, 78 Cal.App. 2d 959, 964, 178 Pac.2d 853. To the word "knowledge" we would add "or notice" meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the material. To appear profound we refer to this knowledge or notice as scienter." The "Scienter" provision of the California statute which was inferentially

approved by the Roth court is substantially the same which was faced by the Respondent State of Georgia in the trial court below, under the jury's instructions which are under attack herein. (See category (4) above.) There is no doubt that "subjective" knowledge was not a requirement under the California test.

The Smith Court did, however, leave a small area undecided, that is whether the defense of "honest mistake" (see category (5) above) in certain cases might be essential as a matter of constitutional principles. In voicing this caveat, a question was raised as to the continued validity of Rosen v. U.S., 161 U.S. 606 (1896) the longstanding Supreme Court case authority in this area which had been cited with approval in Roth v. U.S., 354 U.S. 476. If "honest mistake" were to be a defense, then, notwithstanding Rosen v. U.S., the "mens rea" requirement must reflect a "subjective" standard to some extent in that the defendant would, in certain cases, have the opportunity to offer evidence on "good faith belief" and be entitled to an instruction as to that defense. It had generally been accepted that the Rosen case made subjective knowledge of obscenity completely irrelevant.

All questions as to the force and validity

of Rosen v. U.S. were put to rest in Hamling v. U.S., where this court upheld the instruction of the trial court in Hamling, supra, that the defendant's belief as to the obscenity or nonobscenity of the material is irrelevant. (Category (5) above, is not available as a defense.)

At page 13 of his brief, Petitioner attacks the Georgia obscenity statute as applied to him, and makes an argument that such a requirement has a "chilling effect" on free speech. The answer to that argument is found in U.S. District Court Judge George C. Young's dissent in Russ Meyer et al. v. T. Edward Austin, State Attorney for the Fourth Judicial District in and for the State of Florida, 319 F.Supp. 457, where he said: "Chilling of First Amendment Rights is, of course, proscribed by the Constitution. But obscenity does not have such protection and the "chilling" of obscenity is not only permissible but a legitimate interest of the state."

This Court should not inquire into the constitutionality of a state statute, or its component parts, in the abstract. U.S. v. Raines, 362 U.S. 17. Similarly, Petitioner may not direct his objections to an isolated portion of the jury's instructions. One of

the basic principles of a jury trial is the requirement that a charge to the jury must be read in its entirety. An examination of all of the other instructions on the issue of "scienter" show that the jury was properly instructed on "scienter".

Further, in relation to the evidence which was presented, those instructions fairly and accurately stated the law of the case. The circumstantial evidence which was before the jury on the "scienter" issue, as to Count 1, demonstrates that the jury was justifying in concluding from: petitioner's presence at the theater; the nature of the theater; the pornographic nature of the single film which was being exhibited; his actions, which gave the appearance of being the person in charge; that he, at the very least, had "knowledge of facts which would put a reasonable prudent man on notice as to the obscene nature of the film" (Category (4) above) and that he was an "aider and abetter" as to its exhibition. The circumstantial proof as to Count II is even stronger and would support a finding that he had knowledge of the obscene nature thereof. (See Category (3) above.)

III

The film "Behind the Green Door" is hard-core pornography and contraband under federal standards. This court's action in Ballew v. State of Georgia was an unlimited grant of a petition for writ of certiorari, which squarely places before this court the critical question as to whether the film "Behind the Green Door" is hard-core pornography and contraband under federal standards. Although the issue as framed by Petitioners in question 3 may technically be resolved without considering federal standards, as by a simple reply that the film is not protected by the First and Fourteenth amendments, this court should not consider the question to be so limited. While such a determination would avoid an application of federal standards, it would permit the petitioner to continue making indirect challenges to the federal obscenity laws without suffering any of the consequences. Amicus submits that this court, in recognition of its broad responsibility for the effective administrative and execution of the federal obscenity laws, should treat question 3 as presenting the broad question as framed by the Petitioner's own request at page 19 of

his brief reading: "The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity vel non of the nationally acclaimed motion picture film "Behind the Green Door" upon which the Petitioner's conviction rests."

The disposition of hard-core pornography is inherently a matter for federal control. In Congress, the several states have assembled and established a comprehensive set of controls on obscenity over (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. In the case of international movement, controls have been supplemented by treaty abroad. By the weight of judicial authority, such subject matter is regarded as uncopyrightable under federal laws. Material which is obscene under federal standards is also contraband.

In view of the above widespread federal legislation, obscenity is not simply a matter of state interest, it is under the "one people" concept, a matter of state and federal interest. Under the "one-people" concept of federalism, the federal government is envisioned as having been granted plenary control and charged with the duty and responsibility of administering those controls which have been established

by their representatives at the national level; in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one-people" concept, the federal government would have total control over the subject matter as to which reasonable minds would not differ and all would hold to be pornographic - hard-core pornography.

Independant federal interest have been "identified" by this court in the well-documented views of Justice Harlan in his obscenity decisions. See Roth v. U.S. , 354 U.S. at 497-498. Justice Harlan was using as a common denominator the "bottom of the barrel" quality of material, as to which it might be said that reasonable minds would not differ, and could come to but one conclusion. Under the Justice Harlan view and the "one-people" concept, it was the expectation of the compact states that the federal government would administer those powers to suppress that subject matter which was considered by the States as a whole to be injurious to public morals, as declared by their representatives in federal legislation.

Where the subject matter involves blatant, hard-core pornography federal standards are drawn in issue. When Congress exercises a

granted power, the federal legislation may displace state law under the supremacy clause. In a situation such as this, where the federal statutes clearly point to a total restrain of hard-core pornography, the federal compact must be given recognition, and federal preemption as to the category "hard-core" pornography is clearly in order.

While Congress has never established a federal definition on obscenity, it has specifically held that traffic in obscenity and pornography is a matter of national concern. See Section 1 of Public Law 90-100. See also Senate Resolution No. 477, rejecting the findings and recommendations of the Commission on Obscenity and Pornography, which recommended the liberation of obscenity.

In Smith v. U.S. the majority of this court restated the following basic principles in the federal area of obscenity: (1) the regulation of obscenity is a matter of particular federal concern; (2) federal as well as state interests are concerned; and (3) where a conflict exists, the principles of federal supremacy must prevail. For the above reasons, this court should not avoid the issues which have been drawn by the petitioner but should determine whether or not the films "Behind

the Green Door" is obscene under federal law.

In his brief at page 20, the petitioner has requested the majority of this court to reconsider the landmark decisions in Miller v. California and its companion cases. No valid reasons are given for such reconsideration. As recently as March 1, 1977, this court reaffirmed the existence of those federal standards in Marks v. U.S. ___ U.S. ___ (Mar. 1, 1977). Having specifically defined the standards of this nation over four years ago, this court should now apply those federal standards in a meaningful manner which will shed some light as to what those abstract standards mean, in terms of the law and the moral values of this nation as a whole.

Clearly, the motion picture "Behind the Green Door" constitutes subject matter which is proscribed and declared illegal (contraband) under the federal test articulated by this court in Miller v. California and its companion cases. Such subject matter (1) taken as a whole, appeals to a prurient interest in sex, (2) portrays in a patently offensive way sexual conduct specifically defined by law, and (3) taken as a whole, does not have serious literary, political, social, artistic, or scientific value.

For purposes of "instant" analysis, amicus has attached to this brief at Appendix "D" and Appendix "E" an accurate continuity and time-and-motion study of the film "Behind the Green Door". The sexual conduct which is portrayed in a patently offensive way, and which offends the above stated federal standards, is set forth, with appropriate references to where such explicit sexual conduct appears in the time-and-motion study.

Petitioner's irresponsible claim to this court that the subject matter described above is a "nationally acclaimed motion picture film" explains the frustration felt by law enforcement officials today as they view the courtroom scene. What is needed, at the present time, is an acknowledgment that "common sense" still prevails, and an exercise of the type of judgment immortalized by Hans Christian Anderson in his fable "The Emperor's New Clothes".

The views against obscenity prosecution which Justices Brennan, Stewart, and Marshall currently espouse, run contrary to the nature of man and in words of Alexander Pope "embrace" the "Monster Vice". In addressing himself to this subject in U.S. v. Four (4) Books, 289 F.Supp. 972, U.S. District Judge Pierson

Hall opened his remarks with a reference to the observation of Alexander Pope, written 200 years before, in his "Essay on Man". "Vice is a monster of so vile a mien, As, to be hated, needs but to be seen; Yet seen too oft, familiar with her face, We first endure, then pity, then embrace." The suggestion made by Petitioner that the conduct described herein should be legalized because such cases "place an incredible strain upon the rare resources of judicial time and energies", etc. is nothing less than a bold argument that, because we have "seen", "hated", "familiarized ourselves with" and "endured", the "Monster Vice", we should now "pity" and "embrace" it. The same and similar arguments were made and rejected by a clear majority of this Court in the Miller decisions.

While a new majority of this Court has been formed which, hopefully, may be able to restore some lawful order to what has been regarded as a hopeless "Court" situation, the fact that Petitioner herein has been able to gain support from Justice Stevens' recent arrival on the bench in 1975 requires some renewed effort to fix the responsibility the remaining dissenting members for the unsatisfactory conditions which presently exist.

There is an extraordinary amount of hard evidence, which the members of this Court cannot fail to take note of, that this country is "in extremes" in relation to its public morals and enforcement of the criminal laws. That condition did not exist ten years ago in 1964, when Justice Brennan's plurality opinion was announced in Ohio v. Jacobellis and became the controlling precedent. There was little hard-core pornography on the black market. Its potential presence on the public screen was then unthinkable. Less than 13 years later, under the influence of Justice Brennan's opinions, the public screens and neighborhoods are now overrun with such materials. Even worse, they have found their way into cheap videotape reproductions and are presently being marketed for private T.V. consumption in the homes of those neighborhoods. Similarly, in the year 1964, there was little public evidence of any widespread sexual molestation of children, and none in relation to the production of pornography. In the year 1977, the extent of "child pornography" is a matter of public disgrace. The decisions of this Court prior to 1973 are clearly responsible for these unfortunate 1977 developments. Except for the decisions written by the present

dissenting justices in the years 1964 to 1973, the neighborhoods of this nation would not be flooded by hard-core pornography and would not be visited with the problem of "child pornography".

Justice Stevens' statement in his separate opinion in Smith v. U.S. that he believes that "criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection" does not give proper consideration to Alexander Pope's warning on the nature of man noted above, and what the past decisions of this Court have wrought in the past 20 years. It would appear that Justices Brennan, Stewart and Marshall, by continuing in their efforts to perpetualize all they have done and said in their pre-1973 opinions, are expressing a willingness to "accept and embrace the Monster Vice." If Justice Stevens is willing to accept this Court's pre-1973 performance, and the resulting consequences which exist today, and join Justices Brennan, Stewart and Marshall in their present views, then certainly his opinion in Smith must also be read as expressing a willingness to "accept and embrace the Monster Vice".

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT DOES NOT PREVENT THE STATE OF GEORGIA FROM ADOPTING A PROCEDURE WHICH PROVIDES FOR THE TRIAL OF MISDEMEANOR CRIMINAL CASES TO A JURY OF FIVE PERSONS.

A. The Criminal Procedure Employed By the Trial Court Below Is Authorized By the Georgia Constitution and Georgia Statutes.

The Georgia Constitution authorizes the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the Superior Court where twelve jurors are mandatory. See Code Ann., Section 2-5101, Constitution, Art. VI, Section XVI, paragraph 1.

The Criminal Court of Fulton County is a Court of limited jurisdiction which may only try misdemeanors. By statute, only five jurors are required for the trial of such cases. Such juries are composed of five persons, selected from a panel of twelve. The defendant is

entitled to four preemptory strikes and the State three, with the defendant getting first and last preemptory strikes. Georgia Laws 1890-1891, Vol. 2, P. 935, as amended by Georgia Laws 1935, P. 498. Sanders v. State of Georgia 216 SE.2d 838, 839 (June 2, 1975). Jury verdicts in the Criminal Court of Fulton County must be unanimous as they must be in all Georgia Courts. Ball v. Georgia 9 Ga.App. 162, 20 S.E.2d 888 (1911).

B. Recent Decisions of This Court Have Made It Clear That, Where The Requirement of Unanimity Is Retained, The Trial Of A Criminal Case To A Five-Man Jury Does Not Violate Constitutional Principles.

During the 1969 October Term of this Court, a solid majority held (with Justice Marshall dissenting and Justice Blackmun not participating) that a six-man jury was constitutionally acceptable in state trials under the Sixth and Fourteenth Amendments. Williams v. Georgia 399 U.S. 78, 26 L.Ed2d 446, 90 S.Ct. 1893, (June 22, 1970). In an appendix to Justice Harlan's concurring opinion in Williams, reference was made to the Georgia criminal procedure which authorized a jury of five in criminal misdemeanor cases in the Criminal Court of Fulton County (Atlanta), at page 139:

"Georgia: Constitution, Art I, Section 2-105, Art VI, Section 2-5101; Ga. Code Ann Section 27-2506 (Supp 1968); Ga Laws 1890-1891, pp 935, 939, 942. (In county criminal courts, which have jurisdiction of misdemeanors -- cases in which the maximum sentence imposable is a fine of up to \$1000 or imprisonment for a term of up to 12 months or both -- a defendant may demand a jury trial. Depending upon the county, however, a jury ranges in size from five to 12 persons. The Criminal Court of Atlanta, for example, tries misdemeanors with juries of five. In Hall County the same crimes are tried by juries of 12.)"

In holding that the fact the jury at common law was composed of precisely 12 was "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'", see Williams at page 102, the Court also pointed out at footnote 28 on page 91, ^{5/}with respect to Justice Harlan's opinion and comment as to jury sizes below six,

^{5/}Amicus submits that Petitioner is incorrect in his interpretation of footnote 28 as applied to the five-man jury. (See Brief of Petitioner at p. 4.)

". . . the Court in Williams left open the question of what minimum number of jurors is required to guarantee the constitutional right to jury trial in state criminal cases. 399 U.S. at 91 fn. 28 . . ."

that:

"We have no occasion in this case to determine what minimum number can still constitute a 'jury', but we do not doubt that six is above that minimum" (our emphasis)

Since "six" was "above the minimum" which could constitute a "jury", it must necessarily follow from the opinion as a whole and the plain language meaning of that footnote (unless it is to be interpreted as being inadvertent language) that a jury of one less number (five) would be within the minimum number which would constitute a "jury" under the meaning of the U.S. Constitution.

During the 1971 Term of Court, the above interpretation was reinforced by this Court's decision in Johnson v. Louisiana 406 U.S. 356, 32 L.Ed2d 152, 92 S.Ct. 1620 (May 22, 1972). There, the Louisiana criminal procedure which authorized a jury of five persons and which required a unanimous verdict, was considered by this Court in the context of an equal protection claim that the Louisiana constitutional and statutory provisions, authorizing a verdict by nine of twelve jurors in criminal cases in which the punishment was necessarily at hard labor, was invalid since unanimity was required in twelve-man jury capital cases, and in five-man jury cases in which punishment at hard labor might be imposed.

In Johnson, the majority of the Court (Justices White, Burger, Rehnquist, Blackmun and Powell) rejected that claim as it applied to the five man jury and cited with apparent approval this Court's previous holding in Williams v. Florida, supra, that states are free to try defendants with juries of less than 12 men. See Johnson v. Louisiana, 406 U.S. 356 at 364:

"In order to 'facilitate, expedite, and reduce expense in the administration of criminal justice,' State v. Lewis, 129 La 800, 804, 56 So. 893, 894 (1911), Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. Williams v. Florida, 399 U.S. 78, 26 L.Ed2d 446, 90 S.Ct 1893 (1970). Three jurors here voted to acquit, but from what we have earlier said, this does not demonstrate that appellant was convicted on a lower standard of proof. To obtain a conviction in any of the categories under Louisiana law, the State must prove guilt beyond reasonable doubt, but the number of jurors who must be so

convinced increases with the seriousness of the crime and the severity of the punishment that may be imposed. We perceive nothing unconstitutional or invidiously discriminatory, however, in a State's insisting that its burden of proof be carried with more jurors where more serious crimes or more severe punishments are at issue. (our emphasis)

The majority of the Court also made it clear that whether the burden of proof by the State should be the verdict of 9 out of 12 jurors, or a unanimous verdict of 5 jurors was a matter for the judgment of the Louisiana Legislature. See Johnson v. Louisiana, supra, at page 364:

"As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense."

During the 1975 October Term the identical issue, as is herein present, was before this Court in Sanders v. State of Georgia No. 75-707 in a petition which was filed by the attorneys

of record herein. There the defendant Sanders was charged with a misdemeanor obscenity violation of Criminal Code Section 26-2101 in connection with the exhibition of the film "Deep Throat" in Atlanta, Georgia. The defendant's objection to the 5-man jury was in the form of a motion for a jury of not less than 12 jurors, which was denied by the Criminal Court of Fulton County. On appeal, the Georgia Supreme Court upheld the constitutionality of the Georgia 5-man jury in Sanders v. State of Georgia 216 S.E.2d 838, 839 (June 2, 1975), in the following opinion:

"Appellant's motion for a trial by a jury of not less than twelve jurors was properly denied by the trial court. Only five jurors are required by statute for the trial of misdemeanor cases in the Criminal Court of Fulton County. See Ga.L. 1890-91, Vol. 2, p. 935, as amended by Ga.L. 1935, p. 498. The present Constitution authorizes the General Assembly to prescribe any number, not less than five, to constitute a trial jury except in the superior court where twelve jurors are mandatory. See Code Ann. Section 2-5101, Const. art. VI, Section XVI, par. 1.

"Appellant also argues that a jury of five persons is 'constitutionally inadequate' because it denies him equal protection of the law. We reject this argument in view of Georgia

authority to the contrary. See McIntyre v. State, 190 Ga. 872(5), 11 S.E.2d 5. The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a "jury." In Williams v. Florida, 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed2d 446 (Fn. 28) it is observed 'We have no occasion in this case to determine what minimum number can still constitute a 'jury' but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

A petition for writ of certiorari was denied ^{6/} by a majority of this Court in Sanders v. State of Georgia, 424 U.S. 931, 47 L.Ed2d 340, 96 S.Ct. 1145 (Feb. 23, 1976), with only Justice Brennan, Stewart and Marshall voting to grant the writ and reverse. The vote to reverse was on the

^{6/} See Supreme Court Practice, Stern and Gressman, Fourth Edition, at pp. 213-218, Section 5-7, Significance of Denial of Certiorari. In view of the hard-core nature of the film "Deep Throat", and the inherent problems in this area, if the Sanders case did not merit full review, would not swift and practical justice have been better served by the majority taking a cue from the action of the dissenting minority and voting to grant the writ of certiorari and summarily affirming?

authority of the dissenting justice's obscenity opinion in Miller v. California 413 U.S. 15, and did not consider the five-man jury issue which was raised. A petition for rehearing was also denied in 425 U.S. 945, 48 L.Ed2d 189, 96 S.Ct. 1687 (April 19, 1976).

C. Petitioner's Arguments Present No Questions Which Have Not Previously Been Answered By This Court.

Petitioner's argument at page 6 of his Brief that the decrease in size of a jury from 6 persons to 5 persons has the effect of making such a jury's verdict on "community standards" a constitutionally infirm determination because:

"With each decrease in size, there is an increase in the likelihood of judging any material by a small group containing by chance, highly susceptible and/or totally insensitive persons. The smaller the group the larger the voice of such minority viewpoints"

loses its vitality when considered in the light of this Court's ruling on similar matters in Johnson v. Louisiana, supra. Relative to the certainty of proof on any issue, as affected by the size of the jury, this Court stated in Johnson at p. 362:

"Of course, the State's proof could be regarded as more certain if it had

convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors - a substantial majority of the jury - were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenter's views, remains convinced of guilt . . . " (our emphasis)

Petitioner's argument that, as a matter of constitutional principles, the integrity of a unanimous verdict of 5 jurors on "community standards" is improved by requiring additional jurors is not supported by the Johnson case ruling. Under Johnson, where the size of the jury in a state case is increased to 12 persons, it is sufficient for constitutional purposes that the agreement of only 9 of those 12 be reached for conviction. In such a case the vote of three jurors for acquittal does not impeach the verdict of the other nine nor does it demonstrate that guilt had not, in fact, been proven beyond a reasonable doubt. As to such verdicts, the Court stated at page 360:

" . . . it is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity

or the accuracy of the majority verdict of guilt."

See also Johnson, supra at page 364, where this Court said:

"Three jurors here voted to acquit, but from what we have earlier said, this does not demonstrate that appellant was convicted on a lower standard of proof. . . ."

It should be noted that, in Johnson, the appellant made the opposite argument i.e. that it was easier to convince 9 of 12 persons on a 12 person jury than to convince all of the five on a 5 person jury. There the Court stated that, in any event, it was a matter for the judgment of the legislature, at page 364:

"As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature"

An argument that the above rule can be distinguished as to the issue of "community standards" on the grounds that, by lessening the number of jurors which are available for deliberation, such a determination will suffer since the number of view-points available in the jury discussion have been diminished, is

faced with a counter argument that smaller groups stimulate discussion. In cases where the juries are required to apply their personal knowledge as a basis for determining contemporary community standards, accurate decisions depend upon juror participation and full discussion. "While the critics believe that reducing the size of a jury will limit the constructive participation of a wide variety of members of contrasting backgrounds representing the 'community conscience', studies indicate that in fact the larger groups tend to inhibit discussion, and more active participation by all members is achieved as a result of the reduction" Powell, U. Mich. J.L. Reform 5:87 Fall 1971.

Even were one to concede that the petitioner's argument may have some validity in cases where no evidence is offered, other than the subject matter itself, that situation is under the control of the parties to the action. The jury need not be left solely to apply their individual subjective interpretations for either party may, at his election, choose to introduce evidence for the jury's consideration on the contemporary community standards, Hamling v. U.S., 418 U.S. at 106.

II

THE JURY INSTRUCTIONS ON "SCIENTER"
COMPLY WITH THE CONSTITUTIONAL
REQUIREMENTS SET BY THIS COURT.

At page 11 of his brief, Petitioner has focused this Court's attention on one isolated sentence of the trial court's jury instruction on the mens rea element of the Georgia obscenity crime and, relying upon that single challenge, claims reversible error for failure to comply with the "scienter" requirements established by this Court. Petitioner's attack is faulty for two reasons: (1) Petitioner's analysis of that portion of the instruction which is under attack fails to accord to the language of that challenged sentence the interpretation to which it is entitled under the constitutional principles established in Hamling v. U.S., 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (June 24, 1974), and (2) such challenge fails to consider the instructions on the "scienter" issue as a whole, and in their relation to (a) the accusation which was read to the jury and (b) the evidence which was introduced at the trial.

A. Petitioner's Challenge To A Portion of the Jury Instructions on "Scienter" Is In Error In Its Failure To Comprehend All of What This Court Said In Hamling v. U.S.

Petitioner's objection to the jury instruction on "scienter" appears at page 11 in the Brief for Petitioner. The language of the instruction which is objected to reads as follows:

"The word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." (our emphasis)

Thereafter, petitioner stated his objection to the above portion of the instruction as:

"It authorizes a conviction predicated on mere 'constructive' rather than actual knowledge."

As the basis for this objection, petitioner relies upon certain language taken from the most recent pronouncement of this Court on "scienter" found in Hamling v. U.S., supra, at page 123. That portion of the Hamling opinion upon which petitioner relies, reads:

"We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions

given by the district court in this case satisfy the constitutional requirements of scienter. It is constitutionally sufficient that the prosecution show that the defendant had knowledge of the contents of material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (emphasis added).

Petitioner's analysis of the above language in Hamling, and basis for his claim that the above described jury instruction is erroneous, appears at page 12 of his brief and reads:

"Consistent with the above statement from Hamling, Petitioner contends that the prosecution must show that he 'had' knowledge rather than that he 'should have had' knowledge of the content, character and nature of the materials distributed." (emphasis added).

Clearly, this is an incorrect reading of Hamling, for it fails to take into account the paragraph in Hamling which immediately precedes the above paragraph upon which petitioner has based his argument. The omitted paragraph in Hamling, which is decisive against his claim, refers to this Court's decision on "scienter" in Ginsberg v. N.Y., 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (Apr. 22, 1968) and reads as follows:

"The Mishkin holding was reaffirmed in Ginsberg v. New York, 390 U.S. 629, 20 L.Ed.2d 195, 88 S.Ct. 1274 (1968). There the Court was again faced with the sufficiency of the scienter requirement of another New York statute, which proscribed the 'knowing' distribution of obscene materials to minors. 'Knowingly' was defined in the statute as 'knowledge' of, or 'reason to know' of the character and content of the material. Citing Mishkin, and the New York Court of Appeals' construction of the other similar statutory language, the Court rejected the challenge to the scienter provision." (Our emphasis.)

The Hamling Court, by reaffirming the validity of the language in Ginsberg v. N.Y. reading:

"'Knowingly' was defined in the statute as 'knowledge' of, or 'reason to know' of the character and content of the material." (Our emphasis)

clearly established the validity of the portion of the jury instruction herein under attack. The word "knew" in the paragraph which followed in Hamling, upon which Petitioner relies, taken from the sentence "knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials", really includes "reason to know" as was explained by the Hamling court in the preceeding paragraph in its approval of the language in Ginsberg v. New York of "'knowledge' of, or 'reason to know' of the

character and content of the material."

Similarly, the "reason to know" language, approved in Ginsberg v. N.Y. and Hamling v. U.S. is the equivalent of the prosecutorial burden "should have had knowledge", upon which petitioner bases his entire objection (see p. 27, supra).

The above analysis shows petitioner to be clearly in error when he states, in the concluding paragraph of his argument on "scienter" (Brief for Petitioner at page 18) that:

"What Petitioner does contend is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. Georgia's scienter standard encompassing constructive knowledge goes beyond this by imposing a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so." (Our emphasis.)

Subjective knowledge is clearly not the constitutional requirement for "knowledge". On the contrary, the defendant's conviction must stand even though the jury may be satisfied that, subjectively, the defendant exhibited the film without knowing the obscene nature thereof, which was the language in the accusation as read to the jury.

(1) An Analysis of the Defendant's State of Mind in Relation to the Mental Element of "Knowledge".

To properly interpret the petitioner's basis for his attack on the jury instruction requires an analysis of the state of mind spectrum which may exist "subjectively" in any person who exhibits a motion picture film which is obscene as a matter of fact. Degrees of a person's subjective "knowledge of the fact" and "knowledge contrary to the fact" are listed below in chronological order.

(1) He may have been aware of the fact that the film was obscene from personal evaluation (knowledge of the fact);

(2) He may have believed the fact the film was obscene, but his awareness was not from personal evaluation (knowledge of the fact);

(3) He may have been aware that he had not the slightest notion whether the film was obscene or not (avoidance of knowledge);

(4) He may have believed the film not obscene, but have had no reasonable grounds for his belief (knowledge contrary to the fact—ordinary or criminal negligence);

(5) He may have believed the film not

obscene, but have had reasonable grounds for his belief (knowledge contrary to the fact—free from any taint of negligence—honest mistake).

Addressing himself to the above range in attitudes on "knowledge" as applied to crimes, in general, Professor Rollin M. Perkins notes that the two extremes (1) and (5) require little comment. (Perkins, A Rationale of Mens Rea., 52 Harv. L.Rev. 905 (1939); Perkins on Criminal Law, Foundation Press, Second Edition at p. 775. Only in the most theoretical discussions would it be questioned that, as to category (1), one has knowledge of facts of which he has been made aware by his own observations. Similarly it would not be suggested that, as to category (5), one has knowledge of facts when he has a bona fide belief otherwise, based upon reasonable grounds. So far as guilt knowledge is concerned, such a person would be treated as if the facts were as they reasonably appeared to him to be, unless (a) the particular offense does not require mens rea for conviction, i.e., traffic offense, or (b) the deeds even under the circumstances as they were reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard. In

the latter instance, as in the case of statutory rape, the state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he reasonably believed she was over that age.

Category (2) is regarded as "knowledge" as that word is used in regard to mens rea. The distinction between category 2 and category 3 is the difference between an actual "belief" and a mere fugitive doubt based upon no grounds at all.

Category (3), "guilty avoidance of knowledge" may take either of two forms: One with a deliberate anti-social purpose in mind may make a positive statement purporting to be based upon his own knowledge, being fully aware that he has no such knowledge, in order to forestall an inquiry into the facts by another, or to mislead an inquiry in a proceeding such as the trial of a case; or one with a similar purpose may deliberately "shut his eyes" to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard, and is treated as having "knowledge" of the facts as they are ultimately discovered

to be.

Awareness of fault is the characteristic which distinguishes category (3) from category (4). In category (4), belief contrary to the fact not based upon reasonable grounds, there is no awareness of fault. The belief is entertained but was acquired as a result of negligence.

Categories (1), (2) and (3) are distinguishable from categories (4) and (5) in that in categories (4) and (5), the subjective belief is actually contrary to the fact. Category (4) results from negligence, and category (5) without reference to negligence.

Drawing upon Professor Perkins' analysis of the meaning of "knowledge" as a mens rea requirement for crimes in general, the meaning of "knowledge" as it relates to the "scienter" requirement for the obscenity crime can be diagrammed as follows:

"Knowledge"

(1) Guilty knowledge. Awareness of the fact as a result of personal observation.

(2) Guilty belief which is correct.

(3) Guilty avoidance of knowledge.

(a) Guilty statement as of knowledge by one who is aware that he does not know,—which statement

turns out to be contrary to the fact.

(b) Guilty "shutting of the eyes" for fear of discovering the fact which an investigation would have disclosed.

(4) Bona-fide belief contrary to fact resulting from negligence. (Criminal or ordinary).

(5) Bona-fide belief contrary to fact but based upon reasonable grounds (without reference to negligence—honest mistake).^{6a/}

(2) The Scope of "Scienter" Requirement as Established in Smith v. California and Confirmed in Hamling v. U.S.

The "scienter" requirement came into the law through Justice Brennan's opinion in Smith v. California 361 U.S. 147, 80 S.Ct. 215, 4 L. Ed.2d 205 (Dec. 14, 1959).

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled Sweeter Than Life by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California obscenity statute, and a Los Angeles city ordinance on obscenity.

^{6a/} See footnote 7 on page 41 supra.

Smith was charged only with a violation of the city ordinance. The difference in the two criminal sanctions was explained by Judge Swain in his dissenting opinion in People v. Smith, 161 Cal. App. 2d 860, 237 P.2d 636 (June 23, 1958), which affirmed Smith's conviction at page 641:

"A defendant is not guilty of violating Penal Code Section 311 unless he had knowledge of the character of the material. People v. Wepplo, supra, 947, 78 Cal.App.2d 959, 964, 178 P.2d 853. To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials. To appear profound, we refer to this knowledge or notice as 'scienter.' Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does. . ." (Our emphasis)

The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to this Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and Whittaker) reversed the judgment, ruling that a state cannot constitutionally eliminate all mental elements from the crime; because

to do so seriously restricted the dissemination of books that are not obscene.

The prosecutor's concern was voiced during arguments in the Smith case. If the Smith judgment were reversed, it would establish that a "mental element" was required, but it would also leave a void. What was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? The Smith opinion answered the people's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, and in doing so established, what to Amicus seemed to be rather clear guidelines, at page 154:

"It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harvard Law Review 1, cf. American Communications Association v. Douds, 339 U.S. 382, 411, 94 L.Ed. 925, 950, 70 S.Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element

in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

The language "proving his awareness of its contents" seemed to negate any argument that "subjective" knowledge was a requirement.

The Smith Court at page 152, footnote 9, also cited with approval the scienter requirement of the California obscenity statute considered in California v. Alberts (Roth-Alberts), 354 U.S. 495, 1 L.Ed.2d 1498, 77 S.Ct. 1314 (1957) and sustained in that case:

"The General California Obscenity Statute, Penal Code Section 311 requires scienter, see note 3, and was of course sustained by us in Roth v. U.S." (Our emphasis.)

As stated above at p. 35, the judicial construction given by the California courts to the California statute which was before this Court in the Smith case appeared in California v. Smith, 161 Cal.App.2d 860, 237 P.2d 636 (June 23, 1958):

"A defendant is not guilty of violating Penal Code Section 311 unless he had knowledge of the character of the material. People v. Wepplo, supra, 947, 78 Cal. App.2d 959, 964, 178 P.2d 853. To the word 'knowledge' we would add 'or notice,' meaning

thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials. To appear profound, we refer to this knowledge or notice as 'scienter.'" (Our emphasis.)

Given the principle that this Court must accept a state court's construction of a statute, General Trust Co. v. Blodgett, 287 U.S. 509, 513; Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688, it would appear that this Court saw no constitutional problems with the "scienter" test imposed therein. The prosecutor's burden under California v. Alberts was "knowledge of the character of the material or knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials, and is substantially the same which was faced by the Respondent State of Georgia in the trial court below under the jury instructions which are under attack herein. See p.26 supra.

There is little doubt that "subjective" knowledge was not a requirement under this California test. As in the trial court below, "objective" knowledge was sufficient--the measuring rod was the reasonable and prudent person, not the defendant's state of mind. A reasonable classification of the prosecutor's burden in the Alberts case would certainly include category

(4) above.

The Smith Court did however leave a small area undecided--whether the defense of "honest mistake" in certain cases might be essential as a matter of constitutional principle, at page 155:

"We need not and most definitely do not pass today on...whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse. . ." (Our emphasis.)

In voicing this caveat, a question was raised as to the continued validity of Rosen v. U.S., 161 U.S. 606 (1896), the long standing Supreme Court case authority in this area which had been cited with approval in Roth v. U.S., 354 U.S. 476, at 491 fn. 28. If "honest mistake" were to be a defense then, notwithstanding Rosen v. U.S., the mens rea requirement must reflect a "subjective" standard to some extent in that the defendant would, in certain cases, have the opportunity to offer evidence on "good faith belief" and be entitled to an instruction as to that defense.

It had generally been accepted that the Rosen case made subjective knowledge of obscenity completely irrelevant. There the defendant was convicted under a federal statute which

made it a misdemeanor to "knowingly deposit obscene matter in the mail." The trial court had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant knew that the matter was obscene. On appeal, the U.S. Supreme Court said at page 610:

"The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what

must be deemed obscene, lewd and lascivious." (Our emphasis.)

All questions as to the force and validity of Rosen v. U.S. were put to rest in Hamling v. U.S., supra, when this Court upheld the instruction of the trial court in Hamling; supra, that the defendant's belief as to the obscenity or nonobscenity of the material is irrelevant. See Hamling v. U.S., supra, at p. 622.

The Rosen case in 1896, was, in short, a public policy statement by the High Court that when one deliberately enters the distribution field of material of a sexually descriptive nature, he takes the risk of offending current community standards and must be held accountable if he does. All objections to the strong public policy expressed in the Rosen case should have been dispelled by this Court's 1973 decisions in Miller, et al, which added the requirement of specificity etc.^{7/} If it be thought, as petitioner herein claims, that the law expressed in Rosen puts too great a burden of prescience on defendants, the answer is, in the words of Mr. Justice Holmes, in Nash v. U.S., 229 U.S. 373, 377, cited in Tyomies Publishing Co. v. U.S., 211 Fed. 385:

^{7/} Under Miller, supra, a category (5) situation (honest mistake) becomes largely theoretical. See page 34, supra, footnote 6(a).

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death. . ."

B. The Georgia Obscenity Statute Was Constitutionally Applied. The Jury Instructions, Considered As A Whole, State The Law of the Case Clearly and Fairly.

At page 13 of his Brief, Petitioner attacks the Georgia obscenity statute as applied to him, and makes the same "chilling effect" argument which has been advanced, at some point, in almost every obscenity case from Smith v. California, supra, to the present time. See Brief for Petitioner at page 12 reading:

"There is virtually no evidence at all in the record that Petitioner had any knowledge, constructive or otherwise, of the nature, character or contents of the film with which he is charged. The only evidence at all relating to this issue is a statement by another employee that Petitioner is the manager of the theatre. There was no evidence whatever that he had personally viewed the film, nor was there any evidence at all as to the general fare in the theatre.

"Petitioner complains of the chilling effect upon the distribution of

non-obscene but sexually oriented matter that a constructive knowledge standard of scierter must necessarily produce. It was precisely such a chilling effect which concerned this Court in its examination of the Los Angeles obscenity ordinance which completely dispensed with the scierter requirement. Smith v. California, 361 U.S. 147 (1959). As in Smith, Petitioner here complains of the self-censorship produced by the lowered scierter standard which will impose 'a restriction upon the distribution of constitutionally protected as well as obscene literature.' 361 U.S., at 153".

An appropriate (but rarely cited) response to Petitioner's "chilling effect" argument was made by U.S. District Court Judge George C. Young, dissenting from a three-judge court decision in Russ Meyer, Eve Productions, Inc., Jack Vaughan and Jack Vaughan Productions, Inc. v. T. Edward Austin State Attorney for the Fourth Judicial Circuit in and for the State of Florida, et al., 319 F.Supp. 457, 475 (July 23, 1970):^{8/}

"The majority opinion directs the return to the Citizens for Decent

^{8/} In retrospect, it would appear that U.S. District Court Judge Young's dissenting opinion has since been vindicated. See Huffman v. Pursue Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (Mar. 18, 1975).

Literature, Inc., of a transcript with pictures of the film Vixen which that organization had filed with the Court as amicus curiae. The question of obscenity of that film has not been resolved by this Court or the majority opinion. In fact, that was properly an issue before the state court which has been divested of its authority on that issue by this Court. An examination of the transcript and pictures of the film clearly reveals that it was subject to the challenge of obscenity and while this opinion makes no effort to make such a decision, it is unfortunate that the state court was not permitted to finally determine this issue.

"'Chilling' of First Amendment rights is, of course, proscribed by the Constitution. But obscenity does not have such protection and the 'chilling' of obscenity is not only permissible but a legitimate interest of the state. The majority opinion expresses concern over the finding that the state proceeding 'chilled' the rights of Vixen's promoters. But who can say from the record that such 'chilling' was not justified in the state's efforts to suppress obscenity?" (Our emphasis.)

Amicus submits that Petitioner's arguments on "chilling effect" are inapposite, and that U.S. District Court Judge Young's remarks on that "score" state the correct rule of law which should be applied generally in obscenity cases -- and, particularly, in this case. See the time-motion

study and continuity for the film "Behind the Green Door" appearing in this Brief at Appendix "D" and Appendix "E".

This Court will not, and should not in this case, inquire into the constitutionality of a state statute, or its component parts, in the abstract. See United States v. Raines, 362 U.S. 17, (1960) at page 21:

"This Court, as in the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Immigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U.S. v. Wurzbach, 280 U.S. 396." (Our emphasis.)

Similarly, Petitioner may not, in objecting to the application of the statute to his actions, direct his objections to an isolated portion of the jury instructions. One of the basic principals of a jury trial is the requirement that a charge to the jury must be read in its entirety, and a party may not complain as to the giving of a certain instruction where the charge as a whole states the law of the case, fairly and accurately, 75 Am Jur.2d Trial §924 at p. 791; Agnew v. U.S., 165 U.S. 36, 50, 41 L.Ed. 624, 17 S.Ct. 235 (Jan. 11, 1897).

Counts I and II of the accusation charged that the defendant, on the two days involved, (Nov. 9, 1973 and Nov. 27, 1973) "did, knowing the obscene nature thereof, exhibit a motion picture film entitled, 'Behind the Green Door'" (A7, A8). In explanation of the term "knowing" as used in the accusation, the Court instructed the jury that:

"... the word, 'knowing,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable prudent man on notice as to the suspect nature of the material."

In addition to the above instruction on constructive knowledge of the obscene content, based upon knowledge of facts which would put a reasonable prudent man on notice, the Court also charged the jury as follows, in relation to the element of "knowledge" as it was to be applied to the facts which had been placed in evidence. See Appendix at page A 13.

"Additionally, that the defendant did the act with knowledge, and the Court has charged you that knowledge should be the knowledge of a prudent person. Whether he knew it actually or should have known it, constructive knowledge, that a prudent person under the facts and circumstances as given by the witness here, should have known of the nature of the film being exhibit, that it was obscene and he intended to exhibit the film. You have to find beyond a reasonable doubt that he intended to exhibit the film or that he aided, counseled, abetted and participated in the exhibition of the film, or the intent to exhibit it with the knowledge of its content, with the knowledge that its contents were obscene within the definition of obscenity under Georgia law, or that he as a reasonable prudent man, considering the circumstances should have known."

See also, Appendix at page A 16 (as to Count 1);

"Ladies and Gentlemen of the Jury, the decision as to all matters of fact.

I can only say to you again as I have said to you heretofore, that the issue in this case is formed by the charges made by this Accusation against this defendant. And this defendant's plea of not guilty thereto.

"Now, Ladies and Gentlemen of the Jury, if you believe beyond a reasonable doubt that the defendant, in the County of Fulton, and State of Georgia, at anytime within the two years immediately preceding the date of the swearing out of this Accusation, did, in the County of Fulton, and the State of Georgia, on the 9th day of November, 1973, and this is Count One, commit the offense of distributing obscene materials in violation of the Georgia Code Section 26-2101, in that the said accused did knowing the obscene nature thereof, exhibit a motion picture film entitled, "Behind the Green Door," . . . "

It seems abundantly clear, from the above instructions, taken as a whole, that the jury was properly instructed on the issue of "scienter" insofar as the federal requirement is concerned. Further, in relation to the evidence which was presented, those instructions fairly and accurately stated the law of the case.

The circumstantial evidence which was before the jury on the "scienter" issue as to Count I (Nov. 9, 1973) was as follows:

- (1) The theater was an "adult theater".
- (2) The film "Behind the Green Door",

objectively appraised is 73 minutes of continuous hard-core pornography. That fact is instantaneously discernable.

(See Appendix "E" to this brief.)

(3) The film "Behind the Green Door" was advertised on the marquee by name.

(4) Petitioner was present at the theater on Nov. 9, 1973 both at the time of the first viewing by the officers and much later, at the time of execution of the search warrant.

(5) Petitioner was in the projection room at the time the search warrant was executed.

(6) Petitioner performed acts which tended to show his operational control over the premises. He pushed the button to unlock the door into the theater proper when the officers first viewed the film. After the arrest, he checked the cash register and locked the door to the theater.

The jury was justified in concluding from the Petitioner's presence at the theater on Nov. 9, 1973, the nature of the theater, the pornographic nature of the single film which was being exhibited, and his actions which gave the appearance of being those of a person in

charge, that, at the very least, he had "knowledge of facts which would put a reasonable prudent man on notice as to the obscene nature of the film", and that he was an "aider and abetter" as to its exhibition. See Category (4) at page 34, supra.

The circumstantial evidence which was before the jury on the "scienter" issue as to Count II (Nov. 26, 1973) was as follows:

- (1) The theater was an "adult theater".
- (2) The film "Behind the Green Door", objectively appraised, is 73 minutes of hard-core pornography. That fact is instantaneously discernable. (See Appendix "E" to this brief.)
- (3) The film "Behind the Green Door" was advertised on the marquee by name.
- (4) The film had been playing at that theater for a substantial period of time (at least two weeks, Nov. 9th - 26th).
- (5) Petitioner was present and performed acts which inferred that he was in control of the premises when the film played there on Nov. 9, 1973 and was arrested in connection with that exhibition. In legal proceedings preceding the second exhibition on Nov. 26, 1973, he waived a commitment hearing (that there was "probable cause" for the Nov. 9th arrest).

(6) Petitioner performed acts at the time of the Nov. 26th arrest which tended to show that he was the person in operational control of the theater. He gave instructions to the cashier, received money when the cashier refused to take the same, and locked the place following the second arrest.

The jury was justified in concluding from the petitioner's presence at the theater, the adult nature of the theater, the pornographic nature of the single film which had been advertised and exhibited at the theater for a substantial period of time, the fact that he gave the appearance of being the person in operational control, and his waiver of "probable cause" as to the first arrest at the commitment hearing on Nov. 26, 1973, that he performed his functions at the theater on Nov. 26, 1973 "knowing the obscene nature thereof" (category (3)) or, at the very least, had "knowledge of facts which would put a reasonable prudent man on notice as to the obscene nature of the film" (category 4) and that he was an aider and abetter as to its exhibition.

III

THE FILM "BEHIND THE GREEN
DOOR" IS HARD-CORE PORNOGRAPHY
AND CONTRABAND UNDER FEDERAL
STANDARDS.

This Court's action in Ballew v. State of Georgia, ___ U.S. ___, 50 L.Ed.2d 789, ___ S.Ct. ___ (Jan. 25, 1977), was an unlimited grant of the petition for writ of certiorari. That Order places before this Court all three of the questions which were presented in the petition, including Question 3, reading in part: "Whether the motion picture film 'Behind the Green Door'. . . constitutes speech protected by the First and Fourteenth Amendments to the U. S. Constitution." Assuming that the Georgia Court of Appeals was correct in its rulings on the first federal question involving the 5-man jury issue, and the second federal question involving the Georgia statutory standard for "scienter", then this Court has squarely before it the critical question as to whether the film "Behind the Green Door" is hard-core pornography and contraband under federal standards. ^{8/}

^{8/} The definitional aspect of the Georgia obscenity statute does not present a federal question. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69, 37 L.Ed.2d 446, 464, 93 S.Ct. 2628

Although the majority of this Court may avoid facing this issue, see Justice White's separate opinion in J-R Distributors, Inc., et al. v. Washington, 418 U.S. 949, 41 L.Ed.2d 1166, 94 S.Ct. 3217 (July 25, 1974) at 1167:

"As for the materials on file, it is sufficiently clear to me that they fall within the category of hard-core pornography unprotected by the First Amendment that plenary review is not required. One of the publications involved is Sex Between Humans and Animals. Mr. Justice Brennan would apparently hold that the First Amendment prohibits government from denying consenting adults access to such material, but I do not construe the First Amendment as preventing the States from prohibiting the distribution of a publication

(June 21, 1973), affirmed on the original decision in Slaton v. Paris Adult Theatre, et al., 231 Ga. 312, 201 S.E.2d 456, 460 (Oct. 30, 1973), petition for writ of certiorari denied in Paris Adult Theatre I et al. v. Slaton, 418 U.S. 939, 41 L.Ed.2d 1173, 94 S.Ct. 3227 (July 25, 1974), with Justices Brennan, Stewart, and Marshall dissenting. Although the issue as framed by Question 3 may technically be resolved by an answer that the film is not protected by the First and Fourteenth Amendments, other considerations noted herein would seem to require that the subject matter should be considered in the light of the broader question as to whether the film is also obscene under federal standards. See page 61, infra.

whose dominant theme is represented by repeated photographs of men and women performing sex acts with a variety of animals." Mr.

Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

Amicus submits that it should not do so. See page 3, supra, at footnote 2. Because of the critical problems which all of law enforcement presently face in the obscenity area, the question of the hard-core nature of the film "Behind the Green Door" does today present a substantial federal question. See pages 4-8, supra.

A. The Disposition of "Hard-Core Pornography" Is, Inherently, A Matter for Federal Control.

In Congress, the several states have assembled and established a comprehensive set of federal controls on obscenity over (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. See 18 U.S.C. Sections 1461-1465, 1735, 1737; 19 U.S.C. Section 1305. In the case of international movement, those controls have been supplemented by treaty abroad. See Roth v. U. S., 354 U.S. 476 at 484. By the weight of judicial authority, such subject matter is regarded as uncopyrightable under federal laws. See Mitchell Brothers Film Group, et al. v. Cinema Adult Theatre, et al., a copy

of which appears at Appendix C to this Brief. See also Section 8 of Article I of the United States Constitution and Title 17 U.S.C. Material which is obscene under federal standards is contraband, See U. S. v. Obscene Magazines, 382 F.Supp. 975 at 976 (Oct. 1, 1974). See also Burke v. Kingsley Books, Inc., 142 N.Y.S.2d 735, 208 Misc. 150, affirmed 151 N.Y.S.2d 639, 1 N.Y.2d 177, 134 N.E.2d 461, affirmed Kingsley Books, Inc. v. Brown, 354 U.S. 436, 1 L.Ed.2d 1469, 77 S.Ct. 1325 (June 24, 1957).

In view of the wide-spread state and federal legislation, obscenity is not simple a matter of state interest. It is, under the "one people" concept, a matter of state and federal interest.^{9/} The "one people" concept of federalism, (see Hoke v. U. S., 27 U.S. 308 (Feb. 24, 1913), envisions the federal government as having been granted plenary power and charged with the concomitant duty and responsibility of administering

^{9/} See Part XIV entitled "The 'One People' Concept", appearing in "The Challenge of a Modern Federal Criminal Code, Statement in the U. S. Senate by Senator John L. McClellan, March 11, 1971, in Hearings Before the Subcommittee on Criminal Law and Procedure of the Committee on the Judiciary, U. S. Senate, Ninety-Second Congress, First Session, Part 1", at page 30.

those controls, which have been established by their representatives at the national level, in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one people" concept, the federal government would have total control over subject matter as to which reasonable minds would not differ and all would hold to be pornographic (hard-core pornography).

Independent federal interests have been "identified" by this Court in the well-documented views of Justice Harlan. See, for example, Roth v. U. S., 354 U.S. at 497-498. In enumerating his hard-core pornography rule limitation on federal power, Justice Harlan was using as a common denominator that "bottom of the barrel" quality of material as to which it might be said that reasonable minds would not differ, and could come to but one conclusion.^{10/}

^{10/} Conceptually speaking, obscenity might be visualized as a polluted liquid of varying densities contained within a barrel, with hard-core pornography, with the heaviest density, lying at the bottom of the barrel. Protected free speech can be visualized as that clear liquid which overflows and lies outside the barrel. That subject matter which lies inside the barrel and on top of the density layer which is "hard-core pornography" is non-protected subject matter, which states may legalize or proscribe in their discretion.

Amicus submits that the foundation for Justice Harlan's views are to be found in the "one people" concept, that is, that by granting such powers to the Federal government, it was the expectation of the compact States that the Federal government would administer those powers to suppress that subject matter which was considered by the States as a whole to be injurious to public morals, as declared by their representatives in federal legislation.

B. Where the Subject Matter Involves Blatant Hard-Core Pornography, Federal Standards Are Also Drawn in Issue.

When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed.23 (1824). Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-230, 11 L.Ed. 1447, 67 S.Ct. 1146, 1151, 1152 (1947). In a situation such as this, where the federal statutes clearly point to a total restraint, the federal compact must be given recognition. Federal preemption as to the category "hard-core" pornography is clearly in order.

While Congress has never established a federal definition of obscenity, it has not, as noted above, been silent about whether or not obscenity should be proscribed. In its

most recent Act of October 3, 1967, Public Law 90-100 81 Stat. 253 (creating the Commission on Obscenity and Pornography) Congress specifically held that the traffic in obscenity and pornography is a matter of national concern. See Section 1 of Public Law 90-100 which provided:

"Section 1. Finding of fact and declaration of policy. - The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels. It is the purpose of this Act to establish an advisory commission whose purpose shall be, after a thorough study which shall include a study of the casual relationship of such materials to antisocial

behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography."

See, also, Senate Resolution No. 477, rejecting the findings and recommendations of the Commission on Obscenity and Pornography, which recommended the liberation of obscenity. (Congressional Record for October 13, 1970, at pages 36474-36478.) The most logical solution to this federal definitional problem and the concomitant problem of defining the overall federal responsibility in the obscenity area lies in Justice Harlan's views of the category of obscenity, "hard-core pornography", and federal power in relation thereto, cited with approval in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607.

In Smith v. U. S., ___ U.S. ___, 52 L.Ed.2d 324, 97 S.Ct. ___ (May 23, 1977), Justice Blackmun, speaking for a majority of this Court, restated the following basic principles in the federal area of obscenity:

- "1. the regulation of 'obscenity' is a matter of particular federal concern;
2. federal as well as state interests are concerned; and
3. where a conflict exists, the

principles of federal supremacy must prevail." 11/

11/ See Smith v. U. S., ___ U.S. ___, 52 L.Ed.2d 324 at page 337, footnote 10:

"The language of § 1461 gives no indication that Congress intended to adopt state laws relating to distribution of obscene material for purposes of the federal statute, nor does its history. See n 12, *infra*. Furthermore, none of the usual reasons advanced in favor of such adoption are present here. The regulation of the mails is a matter of particular federal concern, and the nationwide character of the postal system argues in favor of a nationally uniform construction of § 1461. The Constitution itself recognizes this fact, in the specific grant to Congress of power over the postal system. Art I, § 8, cl 7. Obscenity in general has been a matter of both national and local concern. To the extent that local concern is relevant, however, the jurors' application of contemporary community standards fully satisfies that interest. Finally, to the extent that the state law and the federal law conflict, traditional principles of federal supremacy require us to follow the federal policy. See Clearfield Trust Co. v. United States, 318 U.S. 363, 87 L.Ed. 838, 63 S.Ct. 573 (1943); United States v. Standard Oil Co., 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947); DeSylva v. Ballentine, 351 U.S. 570, 100 L.Ed. 1415, 76 S.Ct. 974 (1956); United States v. Little Lake Misere Land Co., 412 U.S. 580, 37 L.Ed. 2d 187, 93 S.Ct. 2389 (1973). See generally Comment, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U.Chi. L.Rev. 823 (1976). We therefore decline petitioner's invitation to adopt state law relating to distribution for purposes of the federal statute regulating use of the mails."

Although the issue as framed by petitioners in Question 3 may technically be resolved without considering federal standards, as by a simple reply that the film is not protected by the First and Fourteenth Amendments, this Court should not consider the question to be so limited. While such a determination would not present a federal conflict and would avoid an application of federal standards, it would also permit the petitioner to continue making indirect challenges to the federal obscenity laws without suffering any consequences. Amicus submits that this Court, in recognition of its broad responsibility for the effective administration and execution of the federal obscenity laws noted above, should treat Question 3 as presenting the broader question, that is, whether the film "Behind The Green Door" is also obscene under federal standards. In this regard, the Court should treat the scope of the petition as being coextensive with the Petitioner's own request at page 19 of his Brief, reading:

"The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity vel non of the nationally acclaimed motion picture film "Behind the Green Door" upon which Petitioner's conviction rests."

C. Having Specifically Defined the Standards of This Nation In Miller v. California and Its Companion Cases, This Court Should Now Apply Those Federal Standards In a Way Which Will Be Meaningful.

In his Brief at page 20, Petitioner requests the majority of this Court to reconsider the "land-mark decisions in Miller v. California, 413 U.S. 15 (1972) and its companion cases." Amicus submits that Petitioner has given no valid reason for reconsidering the principles set forth in those cases. As recently as March 1, 1977, this Court reaffirmed the existence of those federal standards in Marks v. U.S., ___ U.S. ___, 51 L. Ed.2d 260, 264, 97 S.Ct. ___ (Mar. 1, 1977), where it said at page 263:

"... on June 21, 1973, this Court decided Miller v. California, supra, and its companion cases. Miller announced new standards for 'isolating "hard-core" pornography from expression protected by the First Amendment.' 413 U.S., at 29, 37 L.Ed.2d 419, 93 S.Ct. 2607. That these new standards would also guide the future interpretation of the federal obscenity laws was clear from United States v. 12 200-foot Reels of Film, 413 U.S. 123, 129-130, an n7, 37 L.Ed.2d 500, 93 S.Ct. 2665 (1973), decided the same day as Miller. See Hamling v. United States, 418 U.S., at 105, 113-114, 41 L.Ed.2d 590, 94 S.Ct. 2887."

Having specifically defined the standards of this

nation over four years ago, this Court should now apply those federal standards in a meaningful manner which will shed some light as to what those abstract standards mean, in terms of the law and the moral values of this nation as a whole.

Clearly, the motion picture film "Behind the Green Door" constitutes subject matter which is proscribed and declared illegal (contraband) under the federal test articulated by this Court in Miller v. California and its companion cases. Such subject matter (1) taken as a whole, appeals to a prurient interest in sex, (2) portrays in a patently offensive way sexual conduct specifically defined by law, and (3) taken as a whole, does not have serious literary, political, social, artistic, or scientific value.

For purposes of "instant" analysis, Amicus has attached to this brief at Appendix "D" and Appendix "E", an accurate "Continuity" ^{12/} and

^{12/} The "continuity" is an accurate reproduction of the sound portion of the film, identifying the actors, their roles and what they say as the film progresses. Visual screen depictions are recorded by still camera photographs reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is timed from beginning to end to identify those scenes in point of time.

"Time and Motion Study" ^{13/} of the film, "Behind the Green Door". The sexual conduct which is portrayed in a patently offensive way, and which offends the above stated federal standards, is set forth below, with appropriate references to where such explicit sexual conduct appears in the Time and Motion Study (Appendix "E") for the film "Behind the Green Door."

(a) Lesbianism - Woman stimulating sexual response in another woman (Exhibit E, photos 79-93);

(b) Lesbianism - Cunnilingus, female on female (Exhibit E, photos 140-228);

(c) Lesbianism. Group of females sexually arousing single naked female (Exhibit E, photos 164-166);

(d) Lesbianism - female mouth to mouth embrace (Exhibit E, photos 230-233);

^{13/} The "time and motion study" consists of a chronological series of photographs timed in their relative order of appearance, depicting fairly and accurately the sexual conduct visually portrayed on the motion picture screen by such film. The "time and motion study" which appears at Appendix "E" is a 4-1 photographic reduction of the original time and motion study (which is much clearer in detail) being lodged with the clerk of this Court concurrently with the filing of this amicus curiae brief.

(e) Lewd exhibition of genitals.

Black man enters with erection, walks around stage (Exhibit E, photos 240-253);

(f) Cunnilingus, male on female (Exhibit E, photos 254-276);

(g) Sexual intercourse, male on female (Exhibit E, photos 280-369);

(h) Oral sodomy by female on male (Exhibit E, photos 392-393);

(i) Masturbation; female on two males at once (Exhibit E, photos 396-403);

(j) Fellatio - female on male (Exhibit E, photos 406-421);

(k) Masturbation - female on male (Exhibit E, photos 425-426);

(l) Fellatio - female on male (Exhibit E, 433-434);

(m) Sexual intercourse (Exhibit E, photos 435-437);

(n) Cunnilingus - female on female, lesbianism (Exhibit E, photos 481-486);

(o) Masturbation - male onlooker self-masturbation (Exhibit E, photos 495);

(p) Cunnilingus - male on female (Exhibit E, photos 505-520);

(q) Masturbation - female on male (Exhibit E, photos 521-526);

(r) Cunnilingus - male on female

(Exhibit E, photos 527-536);

(s) Oral copulation and cunnilingus in orgy setting (Exhibit E, photos 527-538);

(t) Fellatio - female on male (Exhibit E, photos 539-544);

(u) Cunnilingus and fellatio (Exhibit E, photos 545-550);

(v) Cunnilingus - group sex, orgy setting (Exhibit E, photos 551-562);

(w) Lesbianism - women mouth to mouth (Exhibit E, photos 563);

(x) Fellatio - female on male (Exhibit E, photos 564);

(y) Sexual intercourse (Exhibit E, photos 565-578);

(z) Masturbation - male on female (Exhibit E, photos 579-610);

(aa) Fellatio - female on reclining male (Exhibit E, photos 611-616);

(bb) Anal sodomy (Exhibit E, Photo 617);

(cc) Lesbianism - cunnilingus (Exhibit E, photo 618);

(dd) Lesbianism - mouth to mouth (Exhibit E, photos 633-634);

(ee) Sexual intercourse (Exhibit E, photo 640);

(ff) Oral copulation simultaneous with dual masturbation, performed by the same

female while having sexual intercourse at the same time (Exhibit E, photos 641-666);

(gg) Emission, after withdrawal from sexual intercourse, showing explicit graphic ejaculation in slow motion. (Exhibit E, photos 667-794);

(hh) Fellatio - female on male (Exhibit E, photos 811-849);

(ii) Cunnilingus - male on female (Exhibit E, photos 850-870);

(jj) Sexual intercourse (Exhibit E, photos 871-997);

(kk) Series of flashbacks on all sexual acts while credits are displayed (Exhibit E, photos 998-1041).

Petitioner's irresponsible claim to this Court that the subject matter described above is a "nationally acclaimed motion picture film", see Brief for Petitioner at page 19, explains the frustration felt by law enforcement officials today as they view the courtroom scene. What is needed, at the present time, is an acknowledgment that "common sense" still prevails, and an exercise of the type of judgment immortalized by Hans Christian Anderson in his fable "The Emperor's New Clothes." The relevancy of Anderson's "fairy tale" reference is commented on by Justice Potter in his opinion

in the Ohio Court of Appeals in Ohio ex rel Ewing v. "Without a Stitch", 276 N.E.2d 655, 658 (July 9, 1971), affirmed in Ohio ex rel Ewing v. "Without a Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974). Appeal dismissed for want of a substantial federal question in Art Theater Guild, Inc. v. Ewing, 421 U.S. 923, 44 L. Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975).^{14/}

It would appear from the evidence that "Behind the Green Door" is the type of autoptical "hard-core" material which Justice Stewart has talked about for years. See his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed. 2d 791, 804, 84 S.Ct. 1676 (June 22, 1964), where he stated, "But I know it when I see it. . . ."

D. The Views Against Obscenity Prosecutions Which Justices Brennan, Stewart and Marshall Currently Espouse, Run Contrary To The Nature of Man and, in the Words of Alexander Pope, "Embrace" the Monster Vice.

In addressing himself to this subject in U.S. v. Four (4) Books, 289 F.Supp. 972, 973 (Sept. 10, 1968), U.S. District Court Judge Peirson Hall, opened his remarks with a reference to the observations of Alexander Pope, written

^{14/} See a reproduction of "The Emperor's New Clothes", printed in Denmark by Fyens Stiftsbogtrykkeri, Odense at Appendix "F."

over 200 years before in his "Essay on Man". Judge Hall's remarks on the performance of the plurality of this modern court from Roth in 1957 to Redrup in 1967, made just five years before this Court's majority opinion in the Miller decision, were:

"Vice is a monster of so vile a mien,
As, to be hated, needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace."

"The verity of the above quotation is brought home not only by the continually increasing number of periodicals, paperbacks and other printed material glorifying things which most people regard as indecent or obscene, which flood newsstands and bookracks, but also, to anyone who has read them, by the recent journeys of the Supreme Court of the United States on the question of 'obscenity.'"

The suggestion made by Petitioner that the conduct described herein should be legalized because such cases "place an incredible strain upon the rare resources of judicial time and energies" (Brief for Petitioner at page 21), and "the widespread concern over our presently overworked judiciary" (Brief for Petitioner, at page 22), and "with a view toward alleviating the present institutional strain upon the judiciary and with the further view of reaffirming that 'article of faith that sets us apart from most nations

in the world'" is nothing less than a bold argument that, because we have "seen", "hated", "familiarized ourself with", and "endured" the Monster Vice, we should now take "pity" and "embrace" it.

The same or similar arguments were made and rejected by a clear majority of this Court in the Miller decisions. See the separate opinion of Justice Stevens, concurring in the denial of certiorari in Liles and Bremner v. Oregon, ___ U.S. ___, 48 L.Ed.2d 209, ___ S.Ct. ___ (May 3, 1976). While a new majority of this Court has been formed which, hopefully, may be able to restore some lawful order to what had been regarded as a hopeless "court" situation, the fact that Petitioner herein has been able to gain support from Justice Steven's recent arrival on the bench in 1975 (See Brief for Petitioner at page 22) requires some renewed effort to fix the responsibility of the remaining dissenting members for the unsatisfactory conditions which presently exist.^{15/}

^{15/} For a more comprehensive statement on the responsibility of the plurality of this Court for the proliferation of hard-core pornography based upon its decisions prior to June of 1973, see Motion of Charles H. Keating Jr. For Leave To File A Brief Amicus Curiae in Support of Respondent in Heller v. New York, filed in No. 71-1043 at pp. 1-19.

There is an extraordinary amount of hard evidence, which the members of this Court cannot fail to take note of, that this country is "in extremes", in relation to its public morals and enforcement of the criminal laws. That condition did not exist ten years ago. For example, at the time of the power failure in New York City in November of 1965, no public looting occurred. In contrast, when a lesser power failure of 25 hours occurred in July of 1977, the amount of public looting became a matter of international notoriety. 3481 persons were arrested for looting and 900 blazes occurred, of which 60% were attributable to arson. Other factors may be mentioned, such as the hot month of July, but the fact remains that people are conscious that something startling has taken place -- and within the past 10 years. It is in this general context that the growth in pornography must be considered.

In 1964, when Justice Brennan's plurality opinion was announced in Ohio v. Jacobellis and became the controlling precedent, there was little hard-core pornography on the black market. Its potential presence on the public screen was then unthinkable. Less than 13 years later, under the dominating opinions of Justice Brennan and other individual justices of that plurality court, the public screens and neighborhoods are

now overrun with such materials. Even worse, they have found their way into cheap video tape reproduction and are presently being marketed for private T.V. consumption in the homes of those neighborhoods. Similarly, in the year 1964, there was little public evidence of any widespread sexual molestation of children, and none in relation to the production of pornography. In the year 1977, the extent of "child pornography" is a matter of public disgrace (see Time Magazine dated April 4, 1977 at page 55). Those members of this Court who can see no connection at all between the growth of pornography and the introduction of "child pornography" on the American scene are closing their eyes to the obvious. Had the operations of the major dealers in obscenity, Edward Mishkin, Edmund Leja and Milton Luros, all well-known to this Court, been properly limited by responsible decisions from this Court during that period, there would have been no "markets" today for such an expansion of obscenity into the "child pornography" area. Given the irresponsible decisions of this Court prior to 1973, it was as certain "as God made little apples" that the above-mentioned dealers and others like them would expand their operations into child pornography, which, in fact, they did do. See New York News article dated April 11, 1977 entitled

"King Smut's Tomb Is A Week End Call on Rikers" and the Los Angeles news article dated May 26, 1977 entitled "Thousands of Boys, Girls, Some as Young as 3, Are Used In Sex Magazines, Films." Sadly, it is also true that, except for this Court's pre-1973 decisions on obscenity, there would be no child pornography today, nor would there be any child victims to that trade.

Amicus submits that Justice Stevens' statement in his separate opinion in Smith v. U.S., ___ U.S. ___, 52 L.Ed.2d 324 at 342, ___ S.Ct. ___, that he believes that "criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection" does not give proper consideration to Alexander Pope's warning on the nature of man, and what the decisions of this Court have wrought in the past 20 years.^{16/}

^{16/} Justice Stevens might weigh in the balance what would be the effect upon the lawless element of law enforcement if those persons were instructed that stag films were legal and that it would be fitting and proper to run "stag parties" for the benefit of its members. The newspapers today are filled with news events of judges, prosecutors and police administrators who are on the "take." Would such a rule of law affect their general performance? Alexander Pope and this Amicus say it would. While it is true that crime statistics and the Court's workload may be lowered by making such conduct legal, this is not a proper

If Justice Stevens is willing to accept this Court's pre-1973 performance and the resulting consequences which exist today, and join Justices Brennan, Stewart and Marshall in perpetualizing all they have done and said in their pre-1973 opinions, then surely his opinion in Smith must also be read as expressing a willingness to accept and embrace the Monster Vice.

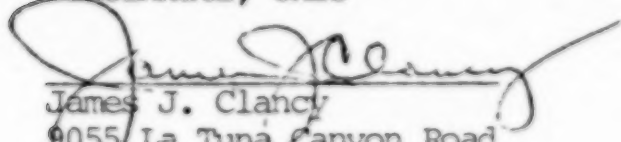
CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: July 18, 1977.

Respectfully submitted,

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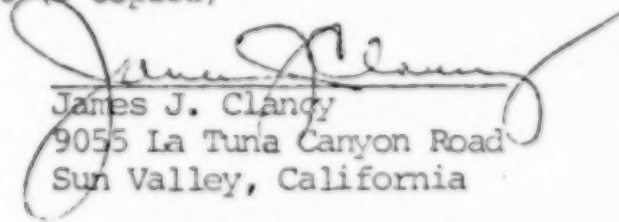
rationale for establishing mandatory rules at the level of the highest court in the land, where one error is fatal to all of the laboratories. Compare Justice Harlan's dissenting opinion in Jacobellis v. Ohio, 378 U.S. 184, 204, 12 L.Ed.2d 793, 807, 84 S.Ct. 1673.

CERTIFICATE OF SERVICE

I, hereby certify that on this 19th day of July, 1977, copies of the within Brief Amicus Curiae of Citizens for Decency Through Law, Inc., an Ohio Corporation, in Support of Respondent State of Georgia were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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APPENDIX A

Opinion of the Court of Appeals of Georgia
in

Claude D. Ballew v. State of Georgia,
138 Ga.App. 530, 227 S.E.2d 65 (Apr. 6, 1976)
. . . . A-1 through A-11

Order of Georgia Court of Appeals,
Dated May 6, 1976, denying Petition for Rehearing
. . . . A-12

Order of Georgia Supreme Court,
dated July 9, 1976
Denying a Petition for Writ of Certiorari
. . . . A-12

A-1

C. D. BALLEW v. The STATE.
No. 51795.

Court of Appeals of Georgia,
Division No. 3.

April 6, 1976.
Rehearing Denied May 6, 1976.

WEBB, Judge.

Claude Ballew appeals his conviction on two counts of distributing obscene materials in violation of Criminal Code § 26-2101. The conviction involved the exhibitions on November 9 and 26, 1973 at an Atlanta theatre of motion picture films entitled "Behind the Green Door." Ballew enumerates thirteen alleged errors, consolidated on argument into six issues.

The first is that the film is not obscene under applicable constitutional law. We were requested to make an independent appellate review of the film and make our own determination of obscenity vel non.

Our Constitution provides that both of our appellate courts are "for the trial and correction of errors of law . . ." Art. VI, Sec. II, Pars. IV and VIII (Code Ann. §§2-3704, 3708). There

is no constitutional provision for an independent appellate determination of the weight of evidence, and it seems to have been well settled that the appellate court's review as to evidence is limited to its legal sufficiency, not its weight. Proctor v. State, 235 Ga. 720, 721, 221 S.E.2d 556; Ridley v. State, 236 Ga. 147, 223 S.E.2d 131. Even so, our Supreme Court has made de novo independent reviews of movie films to decide the constitutional fact of obscenity without reference to the "trial and correction of errors of law" constitutional limitation. Slaton v. Paris Adult Theatre I, 231 Ga. 312, 318, 201 S.E.2d 456; 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; Dyke v. State, 232 Ga. 817, 209 S.E.2d 166 (cert. denied by U.S. Supreme Court April 28, 1975; 421 U.S. 952, 95 S.Ct. 1687, 44 L.Ed.2d 106).

Our view has been that we are limited to a determination of whether there was sufficient evidence to support the jury's verdict. The Supreme Court of the United States held, however, that on appeal in an obscenity case the appellate court cannot merely decide whether there was sufficient evidence to support a finding by the jury that the material is obscene, but must review independently the constitutional fact of obscenity and make a determination of such vel

non. Miller v. California, 413 U.S. 15, 25, 93 S.Ct. 2607, 37 L.Ed.2d 419; Jenkins v. Georgia, 418 U.S. 153, 160(6), 164, 94 S.Ct. 2750, 41 L.Ed.2d 642, 650, 652. That court held that juries do not have unbridled discretion in determining what is patently offensive, and the jury's verdict does not preclude all further appellate review of an accused's assertion that his film was protected by the First and Fourteenth Amendments.

This issue of independent review had been invoked earlier in Jacobellis v. Ohio, 378 U.S. 184, 188, 84 S.Ct. 1676, 1678, 12 L.Ed. 2d 793, 798, wherein Mr. Justice Brennan stated: "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. (Cit.) Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.'"

Mr. Justice Brennan also said that failure to independently review would be "an abnegation of judicial supervision . . . inconsistent with our duty to uphold the constitutional guarantee."

Our own Supreme Court stated in Dyke v.

State, 232 Ga. 817, 821, 209 S.E.2d 166, 169, supra: "We are not bound to approve the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity."

Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective supreme courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. Our purpose was two-fold: to determine if there was sufficient evidence to support the verdict; and, in accordance with the decisions of those courts cited hereinabove (which in our opinion exceed our constitutional appellate review limitation), to decide by an independent appellate review the constitutional fact of obscenity vel non. "There comes a point where this Court should not be ignorant as judges of what we know as men."¹

¹/ Mr. Justice Frankfurter in Watts v. Indiana, 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801, 1805. See Byrom v. Felker, 137 Ga.App. 400, 224 S.E.2d 72.

Section 26-2101(b) of the Criminal Code in effect at the time of the violations² provided: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts

²/ The law was amended in 1975 and broadens somewhat the definition of obscene materials. Ga.L.1975, p. 498.

of masturbation, cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was "the public portrayal of hard-core sexual conduct for its own sake, and (presumably) for the ensuing commercial gain." Miller v. California, 413 U.S. 15, 35, 93 S.Ct. 2607, 2621, 37 L.Ed.2d 419, supra. The film "Behind the Green Door" is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments. Miller v. California, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419, supra; see also Liles v. Oregon, Or.App., 543 P.2d 698, 44 L.W. 3623 (cert. den. by United States Supreme Court May 3, 1976, __ U.S. __, 96 S.Ct. 1749, 48 L.Ed.2d 209).

Ballew's second contention is that the evidence was insufficient to support the verdict. We do not agree.

The film, obviously, is the best evidence of what it represents, and having been before the trial court no other affirmative evidence is necessary to determine its obscenity vel non. Examining the record and viewing a projection of the film, we conclude that the jury's determination that the picture was obscene was

supported by the evidence. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2628, 37 L.Ed.2d 446, supra; Hamling v. United States, 418 U.S. 87, 100, 94 S.Ct. 2887, 41 L.Ed.2d 590, 610. "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." Miller v. California, 413 U.S. 15, 25, 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, supra.

Ballew asserts, however, that the evidence was insufficient to connect him, beyond a reasonable doubt, with the exhibition of this film, "Behind the Green Door." The theatre he managed was an "adult" theatre, and the film was advertised on the marquee. He was present when the film was exhibited on the dates of his arrest. On at least one of the occasions involved herein he sold tickets, and pressed a button to allow entrance into the seating area. He checked the cash register and locked the door after each arrest.

In Dyke v. State, 232 Ga. 817, 822, 209 S.E.2d 166, 170, supra, "Appellant further argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had

control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the theatre was an 'adult theatre.' Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occasion, appellant sold tickets for admission to see it. This was sufficient to authorize the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Code Ann. § 26-801."

We also reject Ballew's assertion that the evidence failed to prove guilty knowledge by him of the nature of the film. Under Criminal Code § 26-2101(a) "knowing" as used therein "shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." See Dyke v. State, p. 822, 209 S.E.2d 166, and cits.

The next argument is that the trial judge improperly instructed the jury as to the law so as to deny him his constitutional rights

guaranteed by the First, Fifth and Fourteenth Amendments. An examination of the various charges complained of, however, reveals that they as a whole comport with Criminal Code § 26-2101, and those approved in Dyke v. State, 232 Ga. 817, 209 S.E.2d 166, supra, and Slaton v. Paris Adult Theatre I, 231 Ga. 312, 201 S.E.2d 456, supra. One charge complained of was a quotation of the definition of obscene material as set forth in § 26-2101. There is no merit in this complaint.

Error is charged on the Court's denial of Ballew's motion to suppress the motion picture film because the search warrants were issued upon affidavits allegedly insufficient to supply probable cause. This same contention was made in Dyke v. State, 232 Ga. 817, 823, 824, 209 S.E.2d 166, supra. The affidavits upon which the two search warrants were issued herein contain rather accurate and full factual descriptions of representative scenes on the film, and were sufficient to show probable cause for issuance of the warrants.

Ballew contends his conviction on two counts in the accusation were but a single transaction and his conviction thereon violated his constitutional rights against double jeopardy as guaranteed by the Fifth Amendment and the Georgia

Constitution. Interestingly, this same argument was made in Dyke v. State, 232 Ga. 817, 827, 209 S.E.2d 166, supra, counsel for Ballew having been counsel for Dyke.

Here, the accused was first arrested for showing the film on November 9, and the film was seized under the search warrant. The accused waived commitment hearing. Subsequently, the accused was arrested on another warrant for showing the same picture, from another copy of the film, on November 26. The statement of Justice Ingram in the Dyke case (232 Ga. 827, 828, 209 S.E.2d 166, 173) is equally applicable here. "Appellant argues that the accusation charged him in two counts of violating the same statute and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption in scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to 'pyramid' the charges and punishment against him . . . but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime." So it is in this case.

Lastly, appellant complains that he was

denied his right to jury trial under the Sixth and Fourteenth Amendments by being tried before a five-person jury in the Criminal Court of Fulton County.

This contention was ruled upon in Sanders v. State, 234 Ga. 586, 216 S.E.2d 838 (cert. denied by U.S. Supreme Court Feb. 23, 1976, ___ U.S. ___, 96 S.Ct. 1145, 47 L.Ed.2d 340) wherein the Supreme Court said: "We reject this argument in view of Georgia authority to the contrary. See McIntyre v. State, 190 Ga. 872(5), 11 S.E.2d 5. The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In Williams v. Florida, 399 U.S. 78, 92(Fn.28), 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446, it is observed: 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

We find no error and affirm the trial court.
Judgment affirmed.

DEEN, P.J., and QUILLIAN, J., concur.

GEORGIA COURT OF APPEALS
DENIAL OF REHEARING

GEORGIA COURT OF APPEALS

May 6, 1976

51795. BALLEW (C.D.) V. THE STATE

W-33

Please substitute the attached new page 7 for that previously furnished in the opinion rendered in the above case on April 6, 1976. The judgement is not affected and the motion for rehearing is denied.

GEORGIA SUPREME COURT
DENIAL OF WRIT OF CERTIORARI

CLERKS' OFFICE, SUPREME COURT OF GEORGIA

Atlanta July 9, 1976

Dear Sir;

Case No. 31362 *Claude Davis Ballew v. The State*

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS.
Clerk

APPENDIX B

Copy of Application on File in the
Copyright Office of the Library of
Congress Under Registration Number
Mp 24594 of the Year 1973 for the
Motion Picture Film "Behind The
Green Door", Application Received
November 8, 1973 B-1, B-2, B-3

Copy of Certificate of Registration
of a Claim to Copyright in a Motion
Picture "Behind the Green Door"
(running time of footage 72 minutes)
. . . . B-4, B-5

Reference: Amicus Curiae Brief at
pages 4 and 5.

Copyright Office of the United States of America
THE LIBRARY OF CONGRESS
WASHINGTON

THIS IS TO CERTIFY THAT THE ATTACHED IS A TRUE COPY OF THE APPLICATION
ON FILE IN THE COPYRIGHT OFFICE UNDER REGISTRATION NUMBER MP 24594
OF THE YEAR 1973

IN TESTIMONY WHEREOF, THE SEAL OF THIS OFFICE IS AFFIXED HERETO ON
March 12, 1974



Barbara Ringer

REGISTER OF COPYRIGHTS

Page 1

Application for Registration of a Claim to Copyright in a motion picture

FORM L-M

 REGISTRATION NO.
MD 25594
 DO NOT WRITE HERE

 CLASSES
L-M

Instructions: Make sure that all applicable spaces have been completed before you submit the form. The application must be SIGNED at line 10. For published works the application should not be submitted until after the date of publication given in line 5 (a), and should state the facts which existed on that date. For further information, see page 4.

Pages 1 and 2 should be typewritten or printed with pen and ink. Pages 3 and 4 should contain exactly the same information as pages 1 and 2, but may be carbon copies.

Mail all pages of the application to the Register of Copyrights, Library of Congress, Washington, D.C. 20540, together with:

(a) If unpublished, title and description, prints as described on page 4, and the registration fee of \$6.

(b) If published, two complete copies, description, and the registration fee of \$6.

Make your remittance payable to the Register of Copyrights.

1. Copyright Claimant(s) and Address(es): Give the name(s) and address(es) of the copyright owner(s). For published works the name(s) should ordinarily be the same as in the notice of copyright on the copies.

Name JARTECH, INC.

Address 1204 Fox Plaza, San Francisco, California 94102

Name _____

Address _____

2. (a) Title: "BEHIND THE GREEN DOOR"
Give the title of this particular motion picture as it appears on the copies.

(b) Series Title: _____
(If work is part of a series with a continuing title, also give series title)

3. (a) Nature of Work: (One of the following boxes MUST be checked. For further information, see page 4.)

☐ Class L—Photoplay

☒ Class M—Motion picture other than a photoplay

(b) Running time or footage: 72 minutes

4. Author: Citizenship and domicile information must be given. Where a work is made for hire, the employer is the author. The citizenship of organizations formed under U.S. Federal or State law should be stated as U.S.A. If the copyright claim is based on new matter (see line 5) give information about the author of new matter.

Name JARTECH, INC. Citizenship U.S.A.
(Name of company) (Name of country)

Domiciled in U.S.A. ☒ Yes ☐ No Address: 1204 Fox Plaza, San Francisco, Ca., 94102

NOTE: Leave all spaces of line 5 blank unless your work has been PUBLISHED.

5. (a) Date of Publication: Give the complete date when copies of this particular work were first placed on sale, sold, or publicly distributed. The date when the motion picture was made or exhibited should not be confused with the date of publication. (See page 4.) NOTE: The full date (month, day, and year) must be given.

April 19 1973
(Month) (Day) (Year)

(b) Place of Publication: Give the name of the country in which this particular motion picture was first published.

NOTE: Leave all spaces of line 6 blank unless the instructions below apply to your work.

6. Previous Registration or Publication: If a claim to copyright in any substantial part of this work was previously registered in the U.S. Copyright Office in unpublished form, or

If a substantial part of the work was previously published anywhere, give requested information.

Was work previously registered? Yes ☐ No ☒ Date of registration _____ Registration number _____

Was work previously published? Yes ☐ No ☒ Date of publication _____ Registration number _____

Is there any substantial NEW MATTER in this version? Yes ☐ No ☒ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version. (New matter may consist of compilation, abridgment, editorial revision, and the like, as well as additional cinematographic work.)

 EXAMINER
 RD

Complete all applicable spaces on next page and SIGN on line 10.

7. If registration fee is to be charged to a deposit account established in the Copyright Office, give name of account.

8. Name and address of person or organization to whom correspondence or refund, if any, should be sent:

Name JARTECH, INC. Address 1204 Fox Plaza, San Francisco, Ca.

9. Send certificate to:

(Type or print name and address) JARTECH, INC.
1204 Fox Plaza
San Francisco, California 94102
 (City) (State) (ZIP code)

10. Certification: I CERTIFY that the statements made by me in this application are correct to the best of my knowledge.

(Application not acceptable unless signed)

James C. Martineau Pres., JarTech, Inc.
 (Signature) (Name and title of applicant or authorized agent)

Application Forms

Copies of the following forms will be supplied by the Copyright Office without charge upon request.

Class A Form A—Published book manufactured in the United States of America.

Form A-B Foreign—Book or periodical manufactured outside the United States of America (except works subject to the ad interim provisions of the copyright law).

Class A or B Form A-B Ad Interim—Book or periodical in the English language manufactured and first published outside the United States of America.

Class B Form B—Periodical manufactured in the United States of America.

Form BB—Contributions to a periodical manufactured in the United States of America.

Class C Form C—Lecture or similar production prepared for oral delivery.

Class D Form D—Dramatic or dramatic-musical composition.

Class E Form E—Musical composition the author of which is a citizen or domiciliary of the United States of America or which was first published in the United States of America.

Class E Form E Foreign—Musical composition the author of which is not a citizen or domiciliary of the United States of America and which was not first published in the United States of America.

Class F Form F—Map.

Class G Form G—Work of art or a model or design for a work of art.

Class H Form H—Reproduction of a work of art.

Class I Form I—Drawing or plastic work of a scientific or technical character.

Class J Form J—Photograph.

Class K Form K—Print or pictorial illustration.

Form KK—Print or label used for an article of merchandise.

Class L or M Form L-M—Motion picture.

Class N Form N—Sound recordings.

Form R—Renewal copyright.

Form U—Notice of use of copyrighted music on mechanical instruments.

COPYRIGHT OFFICE		FILED
APPLICATION RECEIVED	NOV - 2 1973	FILED
TWO COPIES RECEIVED	19 NOV 1973	FILED
TITLE AND DESCRIPTION RECEIVED	23 NOV 1973	FILED
FILED	93183 NOV 8 73	FILED
REMARKS		Noted by C.O. from cert (apoll)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Page 2

Copyright Certificate (17 U.S.C. 215)

Certificate

Registration of a Claim to Copyright

in a motion picture

FORM L-M

REGISTRATION NO.

Mp 24594

DO NOT WRITE HERE

CLASSES

L-M

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereunto affixed.

Barbara Rieger
 Register of Copyrights
 United States of America

1. Copyright Claimant(s) and Address(es):

Name JARTECH, INC.Address 1204 Fox Plaza, San Francisco, California 94102

Name _____

Address _____

2. (a) Title: "BEHIND THE GREEN DOOR"

(Give the title of this particular motion picture as it appears on the copies)

(b) Series Title: _____
 (If made a part of a series with a continuing title, give series title)

3. (a) Nature of Work:

☐ Class L—Photoplay ☒ Class M—Motion picture other than a photoplay(b) Running time or footage: 72 minutes

4. Author:

Name JARTECH, INC. Country U.S.A.

(Name of country)

Resident in U.S.A. Yes ☒ No ☐ Address 1204 Fox Plaza, San Francisco, Ca., 94102

5. (a) Date of Publication:

April 18 1973
 (Month) (Day) (Year)

(b) Place of Publication:

U.S.A.

(Name of country)

6. Previous Registration or Publication:

Was work previously registered? Yes ☐ No ☒ Date of registration _____ Registration number _____Was work previously published? Yes ☐ No ☒ Date of publication _____ Registration number _____Is there any substantial NEW MATTER in this version? Yes ☐ No ☒ If your answer is "Yes," give a brief general statement of the nature of the NEW MATTER in this version: _____

EXAMINED

Complete all applicable spaces on next page.

7. Deposit account:

8. Send correspondence to:

Name JARTECH, INC. Address 1204 Fox Plaza, San Francisco, Ca.

9. Send certificate to:

(Type or print Name) JARTECH, INC.
 (Type or print Address) 1204 Fox Plaza
San Francisco, California 94102
 (City) (State) (ZIP code)

Information concerning copyright in motion pictures

When to Use Form L-M. Form L-M is appropriate for unpublished and published motion pictures which are complete and ready for protection or broadcast.

What is a "Motion Picture"? The copyright law provides for two classes of motion pictures:

—**Photoplays** (Class L) include motion pictures that are dramatic in character and tell a connected story, such as feature films, filmed television plays, and animated cartoons.

—**Motion Pictures Other Than Photoplays** (Class M) include such films as documentaries, newsreels, travelogues, promotional films, and filmed television programs having no plot.

Unpublished Screenplays. The Copyright Office cannot make registration for an unpublished scenario, synopsis, format, or general description of a motion picture.

Unpublished motion pictures

How to Register a Claim. To obtain copyright registration and the following material in the Register of Copyrights, Library of Congress, Washington, D.C. 20540: (1) one "print" taken from each scene or act of the work is a photoplay, or at least two "prints" taken from different sections of the film if not a photoplay. These "prints" may be frames or blow-ups of a film, or, if on videotape, snapshots from a studio monitor; (2) separate title and description (synopsis, press book, continuity,

general description of a motion picture.

No "Mosaic" Copyright. The general idea, outline, or note of a motion picture or of a filmed series cannot be copyrighted. Registration for a motion picture covers the copyrightable material in the film, but does not give any sort of "blanket" protection to the characters or situations portrayed, to future films in the series, or to the series as a whole.

Duration of Copyright. Statutory copyright begins on the date the work was first published, or, if the work was registered for copyright in unpublished form, copyright begins on the date of registration. In either case, copyright lasts for 28 years, and may be renewed for a second 28-year term.

ed.); (3) an application on Form L-M; and (4) a fee of \$6.

Procedure to Follow if Work is Later Published. If the work is later reproduced in copies and published, it is necessary to make a second registration, following the procedure outlined below. To maintain copyright protection, all copies of the published work must contain a copyright notice in the required form and position.

Published motion pictures

What is "Publication"? Publication, generally, means the sale, placing on sale, or public distribution of copies. In the case of a motion picture, it may also include distribution to film exchanges, film distributors, exhibitors, or broadcasters under a lease or similar arrangement.

How to Secure Copyright in a Published Motion Picture:

1. Produce copies with the copyright notice.
2. Publish the work.
3. Register the copyright claim by sending to the Copyright Office: (1) two complete copies of the "best" edition of the motion picture; (2) a separate description (synopsis, press book, continuity, etc.); (3) an application on Form L-M; and, (4) a fee of \$6. The best edition of a motion picture is generally the most widely distributed gauge, in color if available. Videotape: In addition to two copies of the videotape the Copyright Office requires a set of photographic reproductions from the tape including: (a) the title, (b) the copyright notice, (c) production, performance, and creativity credits, and (d) two scenes from different sections of the work.

The Copyright Notice. In order to secure copyright in a published work, it is essential that the statutory copyright notice

should appear on all copies at time of first publication. This notice should consist of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright owner and the year date of publication. Example: © John Doe 1972. The copyright notice should be embodied in the motion picture, preferably at or near the title frame, and should be clearly seen when projected or broadcast. Use of the symbol © may result in securing copyright in countries which are parties to the Universal Copyright Convention.

NOTE: If copies are published without the required notice, the right to secure copyright is permanently lost and cannot be restored.

Return of Deposit Copies. The deposit copies (film, slide or videotape) of published motion pictures are subject to retention by the Library of Congress. However, it may be possible to enter into a contract with the Librarian for the return of the copies under certain conditions, and contract forms may be obtained on request. Information regarding the contract may be obtained from the Exchange and Gift Division, Library of Congress, Washington, D.C. 20540.

FOR COPYRIGHT OFFICE USE ONLY		
Application received	Prints received	One copy received
NOV. -8 1973		
Two copies received		
19 NOV 1973		
Third copy received		
23 NOV 1973		
Fee received		
93183 NOV 8 73		

APPENDIX C

Opinion of U.S. District Judge Robert
M. Hill, filed on September 2, 1976 in
Mitchell Brothers Film Groups et al v.
Cinema Adult Theatre et al, Civil Action
No. CA-3-74-645-D in the U.S. District
Court for the Northern District of Texas
Dallas Division Declaring the film "Behind
the Green Door" to be obscene under federal
standards and uncopy-
rightable. C-1 through C-19
Reference: Amicus Curiae Brief at
pages 4 and 5.

U.S. District Court
Northern District of Texas
FILED
September 2, 1976
Joseph McElroy Jr. Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MITCHELL BROTHERS FILM GROUP,)	
ET AL,)	
Plaintiffs)	Civil Action
)	No. CA-3-74-
v.)	645-D
CINEMA ADULT THEATRE, ET AL,)	
Defendants)	

MEMORANDUM OPINION AND ORDER

Mitchell Brothers Film Group (Mitchell Brothers) and Jartech, Inc., (Jartech), plaintiffs, seek injunctive relief and damages against several defendants who allegedly are unlawfully displaying a motion picture film on which plaintiffs claim a copyright. Plaintiffs contend that the movie was produced by Jartech and that Mitchell Brothers is the exclusive distributor of the film under a distributorship agreement. Plaintiffs assert a cause of action based on

a claim of infringement of a copyright they possess on the movie, a claim of unfair competition, and a claim of interference with the contractual relationship between the plaintiffs.

Defendants are the operators of a theatre in Dallas, Texas. Defendants contend that plaintiffs' asserted copyright is not valid because the movie is obscene, it does not bear a proper copyright, the copyright was secured through fraud on the Copyright Office, and the movie was in the public domain prior to issuance of the copyright. Plaintiffs cause of action is founded on the validity of the copyright in question and if it is invalid or otherwise unenforceable then plaintiffs suit must fail. After considering the evidence, stipulations of the parties, briefs and arguments of counsel, the court is of the opinion that the relief sought by plaintiffs should be denied.

Factual Background

In 1972 Jartech produced a movie in California titled "Behind the Green Door." During a part of 1972 the movie was shown to audiences at a theater in San Francisco which was owned by James Mitchell and Artie Mitchell, who are brothers and the principal owners of Jartech and the principals of Mitchell Brothers. The

movie was shown to test its acceptance by the general public. During this showing the movie bore a notation that it was copyrighted although at the time it had not been registered with the Copyright Office. The film used in this showing was a "first answer print" rather than a "release print," which is the type of film print normally utilized after a movie is copyrighted and distributed for general exhibition to the public.

In early 1973 the sound effects and music of the movie were changed. Jartech then registered the movie with the United States Copyright Office. The registration certificate reflects that the movie was published on April 18, 1973. The application for copyright registration describes the film as a motion picture "other than a photoplay," which is a film that has no plot, such as a newsreel, travelogue, promotional film and nature study film, as contrasted to a "photoplay" film, which includes movies that are dramatic and have a plot or tell a story. James Mitchell testified that he viewed the movie "Behind the Green Door" as a documentary, that it educated viewers regarding sex and that it did not have a plot or story. He further testified that viewers of the movie had different reactions as to whether it told

a story or had a plot. For these reasons he caused the movie to be described in the application for copyright as "other than a photoplay."

On February 1, 1973, Jartech and Mitchell Brothers entered into a Distribution agreement whereby Mitchell Brothers was granted the exclusive right to distribute and exhibit "Behind the Green Door." Thereafter Mitchell Brothers licensed the movie for exhibition to the general public at movie houses across the country.

The defendant Kenneth Bora operates the Cinema Adult Theater in Dallas. Bora acquired several copies of the movie in dispute and he commenced exhibiting it at his theater. Bora did not acquire the movie from the plaintiffs nor did he possess it with plaintiffs permission. Plaintiffs advised Bora that the movie he was displaying at his theater was a "pirated" copy and they demanded that he cease exhibiting it. Bora did not do so, however, until after this suit was filed and this court issued an injunction against him. At one time Bora excised explicit sexual scenes in the movie and he then exhibited the movie in this edited form to patrons of his theatre.

The court has viewed the copy of the film the plaintiffs filed with the Copyright Office, a copy of the film that Bora obtained and

exhibited at his theater, and the portions of this movie that Bora excised. The film acquired by Bora bore a copyright but it was dissimilar to the copyright on the plaintiffs' film filed with the Copyright Office. The dominant theme of the movie is the portrayal of various sexual acts by a female person with a multitude of persons, both male and female. The movie portrays the genital parts of both sexes, acts of fellatio and cunnilingus, and seminal fluid.

Defendants Contentions

When the defendants exhibited plaintiffs' movie at their theater they infringed the copyright. Section 1 of the Copyright Act gives the owner of a copyright the exclusive right to print, reprint, publish, copy and vend the copyright work for a term of years. The defendants did not have permission to use or exhibit the movie, and when they projected an image on a screen from the film of the movie they caused a copy of the film to be created and violated the provisions of Section 1. Patterson v. Century Productions, 93 F.2d 489, 493 (2nd Cir. 1937).

Defendants contend, however, that the copyright is invalid because plaintiffs secured it through fraud on the Copyright Office by describ-

ing the movie in the application for registration as "other than photoplay" when in fact it is a dramatic work and has a plot and therefore should have been described as a "photoplay." Defendants further urge that when the movie was exhibited in 1972 in San Francisco it was done without limitation or restriction and that it could not thereafter be registered and copyrighted because it was then in the public domain. Also, defendants contend that the movie failed to contain a proper copyright mark and therefore is not entitled to the protection of the Act. The court is of the opinion that these contentions are without merit and do not invalidate the copyright protection for this movie.

Defendants first contention is that the plaintiffs committed fraud on the Copyright Office. The court is of the opinion that the movie can be described as having no plot or structured story and that the description of the movie by the plaintiffs as "other than photoplay" is not an incorrect classification. Assuming that this description was incorrect, there has been no showing that it was an intentional act on the part of the plaintiffs which was tainted with fraud, or that it was done with the intent to deceive the Copyright Office. Further, Section 5 of the Act calls for the classification of

works and it sets out certain classes and requires that the application for registration specify under which class the work belongs. The last sentence of section 5 states that any error in classification shall not impair the copyright protection afforded by the Act. Thus any misstatement in the application in describing this movie would not be grounds to invalidate the copyright protection that the movie might otherwise enjoy. Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F.Supp. 1367 (S.D.N.Y. 1969), affirmed 415 F.2d 1007 (2nd Cir. 1969); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); Tiffany Productions v. Dewing, 50 F.2d 911 (D. Maryland 1931).

Defendants' second contention is that the movie was in the public domain before its registration with the Copyright Office. It is true that the general publication without restriction of a literary or other work with the consent of the creator or proprietor places the work in the public domain and it is not copyrightable. However, a limited or qualified publication of a work by the creator or one acting under him will not prohibit a later copyrighting of such work. Baker v. Selden, 101 U.S. 841 (1879); Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 24 (9th Cir. 1933), cert. dismissed 78 L.Ed. 1507. A

publication or showing of a work with only the right to view or inspect it without more is not necessarily a general publication. Patterson v. Century Productions, supra. Likewise, a limited publication to a select group and for a limited purpose and without the right to reproduce, distribute, or sell the work will not be construed as a general publication abrogating the right to copyright the work at a later time. Williams and Wilkins Co. v. United States, 487 F.2d 1345 (U.S.Ct. of Claims 1973); White v. Kimmell, 193 F.2d 744 (9th Cir. 1952). Nor is an exhibition or showing of a work to get a reaction or opinion a publication that constitutes a dedication to the general public; Key West Hand Print Fabrics, Inc. v. Serbin, Inc., 269 F.Supp. 605, 610 (S.D. Fla. 1966), affirmed 381 F.2d 745 (5th Cir. 1967).

The court is of the opinion that the showing of the movie in 1972 was a restricted or limited showing. This showing was to test the acceptance of the movie by the general public. Further, the movie was not distributed at this time to any other exhibitor nor were any copies of the film sold. As a result of this showing the sound track and music of the movie were altered. In addition the film that was utilized in this showing was not the permanent type of

film print that is used when a movie is released for general distribution to the public. Although the movie was not registered with the Copyright Office in 1972 and the copyright notice on the movie may not have created any copyright protection in favor of the plaintiffs, it was nevertheless a public expression by the plaintiffs that the exhibition was intended to be limited or restricted. For the foregoing reasons the court is of the opinion that the movie was not in the public domain before its registration with the Copyright Office in 1973 and that the copyright is not invalid for that reason.

The copy of the movie viewed by the court which was filed with the Copyright Office does bear a proper copyright notice and the defendants' third claim that the copyright is invalid because of an improper copyright mark is without merit.

Defendants finally and strenuously urge that the movie is obscene and the powers of this court should not be invoked to enforce the copyright protection to which the movie would normally be entitled. In deciding this issue the court must first determine whether obscenity is a valid defense to plaintiffs case, and, if so, what standards should be used in deciding whether the movie is obscene.

Section 8 of Article I of the United States

Constitution empowers Congress "To promote the Progress of Science and Useful Arts." Pursuant thereto Congress enacted the Copyright Act (Title 17 U.S.C.). In Section 4 it is provided that works which are subject to a copyright "shall include all the writings of an author." Except for this language the Act is silent as to works which are subject to registration and copyright. The courts, however, have held that some works are not entitled to copyright protection.

In Mazer v. Stein, 347 U.S. 218 (1954) the Supreme Court held that the Copyright Act was intended to afford those who create a work a valuable protection in the work and at the same time "to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world." The court stated:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "science and useful arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the service rendered. (347 U.S. at 219)

This was also the rationale of the Supreme Court in Baker v. Selden, supra, when the court refused

to grant copyright protection to a book the object of which was to exhibit and explain a bookkeeping system. The court emphasized that the purpose of the Copyright Act then enacted was the promotion of the sciences and that a work which did not do so was not entitled to copyright protection. In Stone & McCarrick, Inc. v. Dugan Piano Co., 220 F. 837 (5th Cir. 1915), the Fifth Circuit, relying on the doctrine of clean hands, refused to grant copyright protection to materials which were found to be false and fraudulent. ^{1/}

^{1/}

In Belcher v. Tarbox, 486 F.2d 1087 (9th Cir. 1973), the court, with one judge dissenting, refused to follow the Fifth Circuit and held that materials which might be fraudulent or false were still entitled to copyright protection.

Although few in number, and not of very recent vintage, in those cases where obscenity has been raised as a defense, the courts have uniformly recognized that an obscene work will not be afforded copyright protection by the courts. Martinetti v. Maguire, 16 F.Cas. 920 (No. 9173) (C.C.Cal. 1867), Barnes v. Minen, 122 F. 480 (C.C.S.N.Y. 1903); Bullard v. Esper, 72 F.Supp. 548 (N.D.Tex. 1947); Kahn v. Leo Feist, Inc., 70 F.Supp. 450 (S.D.N.Y. 1947);

Broder v. Zeno Mauvis Music Co., 88 F. 74 (C.C. N.D. Cal. 1898); Simonton v. Gordon, 12 F.2d 116 (S.D.N.Y 1925); Cain v. Universal Pictures Co., Inc., 47 F. Supp. 1013 (S.D. Cal. 1942). See, 41 Opinions of the Atty. Gen. No. 73 (1958), 121 USPQ 329 (1959), wherein it is opined that the Registrar of Copyrights, while authorized to deny registration to obscene works as he may to other noncopyrightable works, is "free to decide not to attempt to refuse or deny registration of claims to copyright in works of the nature discussed." Also, writers on the subject agree that obscene or immoral matters are not the subject of copyright protection. I. Nimmer, Copyright (1972), § 36 at 146.28; Rogers, Copyright and Morals, 18 Mich. L. Rev. 390 (1920); Comment, Immorality, Obscenity and the Law of Copyright, 6 S.Dak. L. Rev. 109 (1961); Copyright Protection for Motion Pictures: Limited or Perpetual, American Society of Composers, Authors and Publishers, 1970 Copyright Law Symposium #18, p. 174. The rationale of the decisions is that a court of equity will not lend its support to one with unclean hands and for purposes that are contrary to the public interest. Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 494 (1942).

Literary and other works that contain

references to and explicitly exhibit sexual activities have inundated society in the past few years. One would think that the courts would have been called upon quite frequently in recent times to reexamine the long standing prohibition against granting copyright protection to obscene and immoral works, but such has not been the case. Thus, the judicial rule proscribing protection to an obscene work remains unchallenged and in the opinion of the court should be followed in deciding this case.

Most states have laws making it a crime to display or exhibit obscene materials. The federal government has also condemned the interstate transportation, mailing and importation of obscene works. Thus, the general feeling as reflected in statutory enactments is that obscene matters do not further public welfare or public interest or promote the progress of science or useful arts as called for in the empowering clause of the Constitution. Therefore "Sacrificial days" devoted to the production of works which do not advance the public interest or welfare are not entitled to the rewards provided for in the Copyright Act and to judicial protection.

By granting copyright protection to obscene matters it could be urged that they would not

be so easily copied and thereby disseminated to the general public. More compelling in the court's mind is the argument that in refusing copyright protection the creator would have no guarantee of exclusiveness to his product and the rewards that flow therefrom and this would thereby tend to inhibit the creation of works which are obscene.

Plaintiffs argue that since the movie is registered with the Copyright Office a presumption is created that it is a proper subject for copyright and it cannot be challenged on the grounds that it is an obscene work. The court disagrees. Copyrights and patents are subject to judicial attack. Even assuming that the registration creates some form of presumption in plaintiffs' favor, the presumption imposes on the defendants the burden of going forward with the evidence to rebut the presumption, but there would still be imposed on the plaintiffs the burden of establishing the validity of their copyright. Rule 301, Fed. Rules of Evid.

Having concluded that the movie is not entitled to protection as a copyrighted work if it is obscene, the court must next determine what standards should be applied in deciding whether the movie is obscene. In Miller v. California, 413 U.S. 15 (1973) the Supreme Court recognized that contemporary community standards were to

be applied in testing the obscenity vel non of a material. The testing by community standards was also adhered to in the earlier cases of Memoirs v. Massachusetts, 383 U.S. 413 (1966) and Roth v. United States, 354 U.S. 476 (1957). Thus, in those cases where it has been determined that the First Amendment does not immunize a person from criminal sanctions when dealing with obscene materials, the Supreme Court has ruled that local standards are to be used in determining whether a material is obscene. Therefore, the issue arises here whether a different standard should be applied in adjudicating an obscenity defense to a suit for copyright infringement. The underlying purpose of the Copyright Act is to grant protection throughout the United States, and therefore the Copyright Act is national in scope and application. Goldstein v. California, 412 U.S. 546 (1973). From this premise it is arguable that a national obscenity standard should be applied, otherwise what might be obscene in Dallas and not protected by the Copyright Act might not be obscene in San Francisco and gain the Acts protection.^{2/}

^{2/} In Cain v. California, supra, in determining whether a copyright encompassed obscene materials the court adopted standards applicable to the federal statute banning obscene materials from

fn. 2 cont.

the mails, 18 U.S.C. §1461. In Bullard v. Esper, supra, the court adopted the standards applicable to the banning of obscene materials from interstate transportation by carriers, 18 U.S.C. §1462. Other courts have adopted different standards. In Kahn v. Leo Feist, Inc., supra, the court in a copyright case examined the work to see if "there was a purpose to corrupt the morals of hearers, or to stimulate thoughts or impulses which would otherwise be dormant." In United States v. One Book Entitled Ulysses, 72 F.2d 705 (2nd Cir. 1934), the court was called upon to determine whether a book was obscene within federal statutes prohibiting importation of obscene materials. The court held that the applicable test was whether the book taken as a whole has a libidinous effect. In Simonton v. Gordon, 12 F.2d 116 (S.D.N.Y. 1925), the court held in a copyright infringement suit that immorality of the copyrighted work as a defense cannot be maintained unless the work was calculated to arouse lust in those who read or viewed it. It is apparent from a review of the earlier cases that there has been no uniformity by the courts in applying standards by which materials are to be judged in determining whether they are obscene.

However, it is the opinion of this court that the pronouncements of the Supreme Court defining obscenity should govern this issue in copyright cases. There is no reason for a national definition of obscenity to be applied in copyright cases when a local standard is applied in criminal obscenity cases. While the Copyright Act is national, so is the First Amendment upon which defenses to criminal obscenity charges are founded.

At the time this movie was produced and registered with the Patent Office the Roth-Memoirs guidelines were the tests utilized in determining obscenity. For a matter to be obscene under those guidelines it was required that (1) the dominant theme, taken as a whole, appeal to a prurient interest in sex; (2) the material be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material be utterly without redeeming social value. Shortly after this movie was filed with the Copyright Office, the Supreme Court handed down its decision in Miller v. California. In that case the court held that the guidelines for determining whether material was obscene were (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value. Since this movie was produced when the Roth-Memoirs guidelines were in effect but was exhibited by the defendants when the Miller guidelines were in effect,

an issue is raised as to which guidelines should be utilized at this time in determining whether the movie is obscene.

In United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973), cert. denied, 418 U.S. 932, the Fifth Circuit held in a criminal prosecution under a federal obscenity statute that if the acts charged occurred while the guidelines enunciated in Roth-Memoirs were effective but the trial occurred while the guidelines enunciated by Miller were effective, then the defendant was entitled to the benefit of both guidelines. If materials were found not to be obscene under either guidelines then the prosecution could not prevail. This holding was affirmed in United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976). In applying the standards in this case the court will look both to the Roth-Memoirs and the Miller guidelines and if the movie is not obscene under either it should have copyright protection.

At the trial of this case neither party utilized the services of an expert on the obscenity issue. This court, therefore, must determine this issue based on its viewing of the movie and applicable Supreme Court guidelines. The court finds that the movie is obscene under the guidelines of both Roth-Memoirs and Miller. The copyright covering the movie is not entitled to the

protection from infringement by the defendants.

For the foregoing reasons, the court is of the opinion that all relief sought by the plaintiffs herein should be denied. A judgment will be entered accordingly.

Dated this 2nd day of September, 1976.

Robert M. Hill (signature)

United States District Judge

APPENDIX D

Continuity for the Motion Picture Film

"Behind The Green Door"

. . . . D-1 through D-37

Reference: Amicus Curiae Brief at page 63,
footnote 12.

D-1

CONTINUITY FOR

"BEHIND THE GREEN DOOR"

SCENE I

(Opens in diner - truck stop. Two men seated, woman behind counter. Two men greet each other.)

5 6

1ST MAN: "Hey!"

2ND MAN: "Hi, Gary. How you doin'?"

1ST MAN: "O.K. Kid."



WOMAN: "Hey, Kish - your buddy's here."

(Man appears wearing white apron and chef's cap. He is owner or operator of diner.)

KISH: "Hi, guys."

2ND MAN: "Hi ya!"

KISH: "Hey, did you hear the radio?"

MAN SEATED: "No, what?"

2ND MAN: "Ya got me?"

KISH: "They got an Italian hijacker up there. Yeah. He just ordered two dollars and

D-2

5,000 parachutes."

7

(Others laugh)

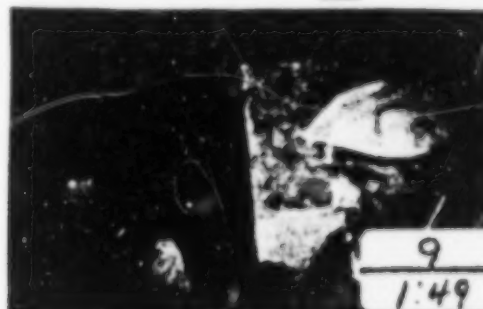


1ST MAN SEATED: "How about some more of your old coffee?"

KISH: "Yeah, I guess we can spare a little of that. Hey, listen, I got you two guys together now. I want to hear that story about that green door you've been promising me. 8



It's been a long time. How about - telling me what happened there, huh?" 9



1ST MAN: "I don't know what do you think?"

2ND MAN: "You tell him."

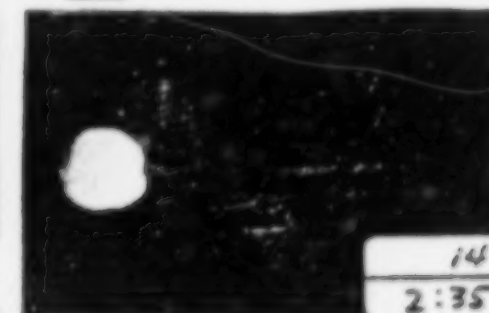
D-3

1ST MAN: "Nah, nobody tells it like you do."

2ND MAN: "Kish, I'll tell you, - warm up my coffee and I'll tell you the story."

KISH: "O.K., O.K."

SCENE II 13



(Opens on highway. Small open sports auto - with a woman driving along a winding road in a mountain area.) 14-15-16-17-18



D-4

(Alternate shots of girl's face and road.) 21



SCENE III

(Face of man at counter, smiling) 23

MAN: "Thank you very much. I hope your stay with us will be very pleasant."

(Phone rings in a room; a man answers.)

24

MAN: "She's here."



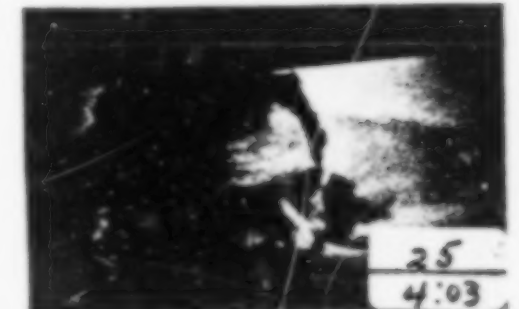
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SCENE IV

(Two men seated. Same two who were seated in the diner in Scene I. Older man is recounting his experiences at a resort.)

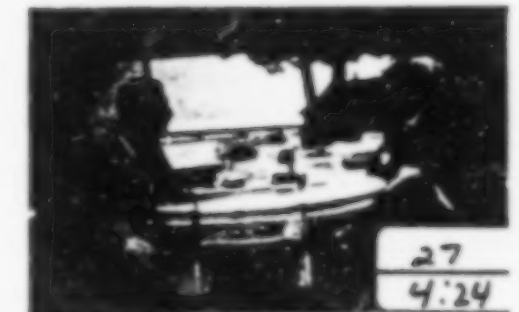
OLDER MAN: "It's funny you got the job. 25

So I give him - give him six bucks and I took the bus the short line bus up to Swan Lake in mountains - taking a bus so I hitchhiked over



to - up to the little resort see - the little resort - was called Cinders In The Pines. Jeez, I came there, there was no pines there. Everything was burned down. See, Jeez, it looked bare as hell quick and at 3 O.K. I was sittin' 27 on

the dining - on the dining room hall on the porch waiting to get in to - hit - to hit the groceries - Man, how I ate, hm!



hm! like the last day on earth. Sour cream and borscht, and herring and chicken and bananas. Yeah, the bus boy - the bus boy used to plead with me, - to talk with the hey for God's sake, give us a break - please will

you leave the table? I mean we gotta clean for the next meal, get out, will ya? So I get out. I load my pockets with bananas. 29 and I have bananas hanging out my pockets like six - six shooters - he says, 'give me a break, will you', and he says, 'by the way, have you been



in the water? Since you been here? - eh, since you been here?' I says 'no - what do you mean today?' He says 'no, since you been here, have you been in the water? I said 'No!' He said, 'well, you better - your wife's here, mate'" (voice fade out)

(Voice fade in) ". . . the top of the rope to the inner tube, and I dropped the rope down and I tied a stone on the other end, so I get that rubber inner tube and tie the top of the rope to the inner tube. I drop the rope down and on the other end of the rope I put a big stone. On the right side of the inner tube, I tie a rope and tie it to a tree on the beach. On the left side of the inner tube, I take a piece of rope and I tie it. I create a lagoon, see - then I get a big sign and I put it up and it says 'beyond this point is dangerous - poisonous frogs,

snapping turtles.'" 33

(Music up) (Woman, who was in small sports car (Scene II) enters and sits at a table. Music over



man's voice as he continues to recount his experiences. Scene continues - two men talking, music in background.) 37 40



MALE VOICE: "She come down to the beach . . . We were dancing there in the Recreation Hall . . . at night see . . . so she's down on the beach, rolling around in the water . . . the lagoon, you know . . . don't let me go . . . voices fade into background.

D-8

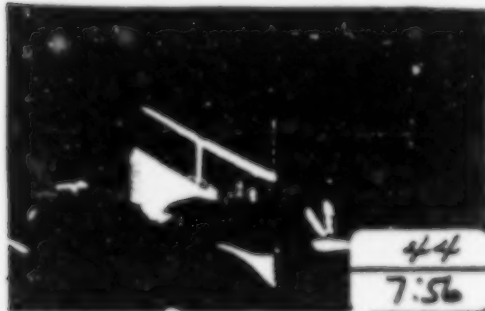
SCENE V

(Sound of crickets) (Night at resort area. Woman descends outdoor stairway. Auto approaches quickly and stops. Several men get out of auto and seize the woman. She screams. 42)

They force her into the car and drive off. One of the men who assisted the others runs after the auto 44 shouting:



1ST MALE: "Hey!"
2ND MALE: "Get her in!" "Hey! Hey! You son of a bitch, stop."



SCENE VI 47

(Inside plush room - two men, same as in Scenes I - IV, appear here. They wait for an attendant. A large man approaches the two men, while passing a football from one hand to



D-9

the other 50. He stands directly in front of the two. He squeezes the football until it explodes. He then questions the two men.



MAN: "Wait a minute, Harry!"

BIG DOOR MAN: "What do you two want?"

YOUNGER MAN: "Oh. Barry Clark. Reservations for two."

BIG DOOR MAN: "References?"

YOUNG MAN: "John Stewart." 52

BIG DOOR MAN:

"You've been here before, Clark, - you know the rules. And tell 'em to your buddy, 53 too."



(As he puts masks on the two men, he then turns to a woman and says, "Escort these gentlemen to their seats, Coco.")

COCO: "Be my pleasure. Follow me,



D-10

please." (Big man laughs.) 54



SCENE VII 55

(Interior of club. An audience is seated - camera pans past a black man standing erect with arms folded, in tights. A clown is performing on stage. 57 60)



SCENE VIII 61

Auto entering street stops. Kidnapped woman is removed from auto and taken into a building.



D-11

SCENE IX

Woman is led into a room where another woman is waiting for her. The woman orders abductors to leave.

WOMAN: "That will do. 65 Leave us." She walks over to the girl.

WOMAN: "Don't be afraid. 67 You poor child. I know exactly how you feel, but please believe me, no one's going to hurt you. Now, Gloria, I'm going to tell you everything that's going to take place, so there's 69 no need to be frightened. But, first, you must try to relax, please. You're trembling. Here, baby, let me try to relax your body. 70 Sit down, there, that's a good girl. You're freezing. Let me try to warm



D-12

you. Gloria, please try to relax. Calm down. Everything's going to be all right, I promise you. Nothing to be afraid of — you know, a long time ago I lay on this very same bed as you are now, 73 and

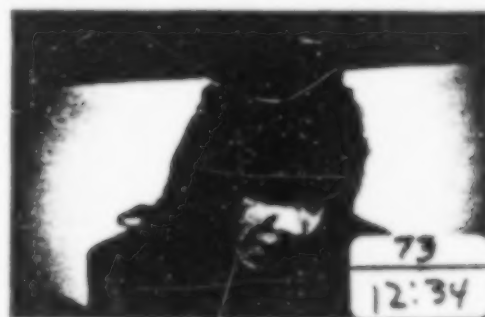
I felt exactly the way that you do, and a kind and lovely woman came in and she administered to me, as I am going to do to you. 74

She prepared me for the most exquisite moment in my life. Try to relax your toes, Gloria. Feel the tingle - relax

them one by one - until they are totally and completely relaxed. Now try to imagine this feeling creeping slowly, ever so slowly up into your feet until they

feel they don't really belong to your body, but exist independently. 77

That's it. Now, your calves - try



D-13

to 78 think of them as part of your feet - warm and heavy. 79



It would be very difficult for you to move them. Concentrate, Gloria. Concentrate 80 on your legs, now extend these feelings up into your thighs. 81 Think about your thighs, how

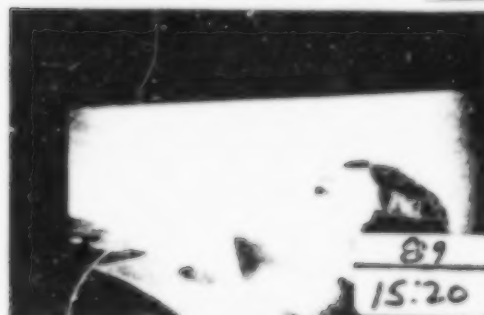


light they seem - as if they float on nothing. 82 Such a lovely child. Lie still, and think of your body and how good it feels, and think only of how



you want to entrust your body to my care. I'm your friend, and you can be assured of my loving compassion. See how the muscles of your belly

soothe under my touch, melting, without form or shape - floating over your vitals - ever so lightly in space. Now your arms, 86 light as air - feel them floating; floating with the rest of you. That's my good girl. Your breasts, Gloria - sensations that you've been feeling through the rest of your body traveled, and now envelope you entirely. 89 Your breasts will begin to feel warm, and your nipples tingle with 90 anticipation. Feel the



nipples grow erect.

91 And the pleasure that you feel from them will go to your very depths and



consume you."

93



SCENE X 94

(Clown, in spotlight, on stage in large room (as Scene VII) pantomiming, 95 after 100)



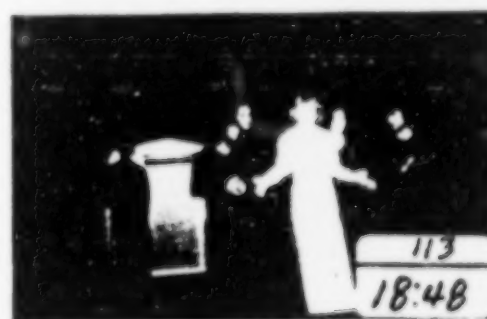
which 102 105 a "voice over" beings.)



VOICE: "Ladies and gentlemen, you are about to witness the ravishment of a woman /107/ who has been abducted. A woman whose initial fear and anxiety has mellowed into curious expectation, although at first her reactions may lead you to believe she is being tortured, quite the contrary is true. For no harm will come to those being ravished. In the morning she will be set free, unaware of anything except that she has been loved as never before. /113/



Perhaps you will recognize one of your friends in the role of victim. Remember you are sworn to observe

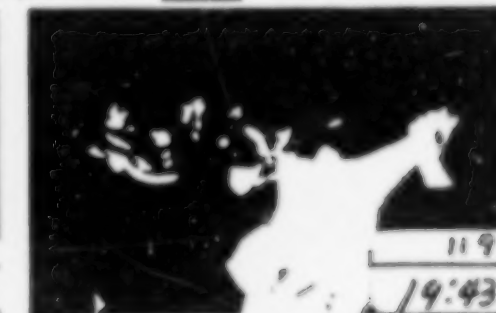


silence. If you break this rule, you will be dealt with severely. So, with the knowledge that you are /115/ powerless to stop the performance, just relax - enjoy yourself to the fullest extent."

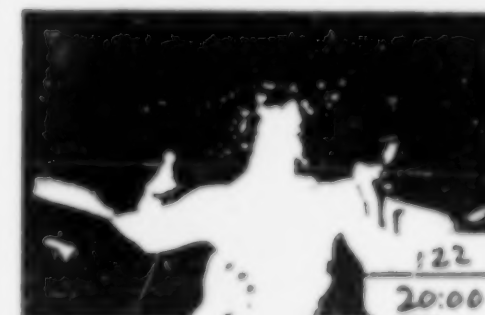
Focus on green door, with spot. Door opens. Girl in Scene IX, who was being administered to, is escorted through the door by several /116/ women attired in dark robes with their hands in a prayer-like position. They then proceed to center stage.



They undress the young woman while simultaneously /118/ rubbing her body all over. The young woman /119/ is held with



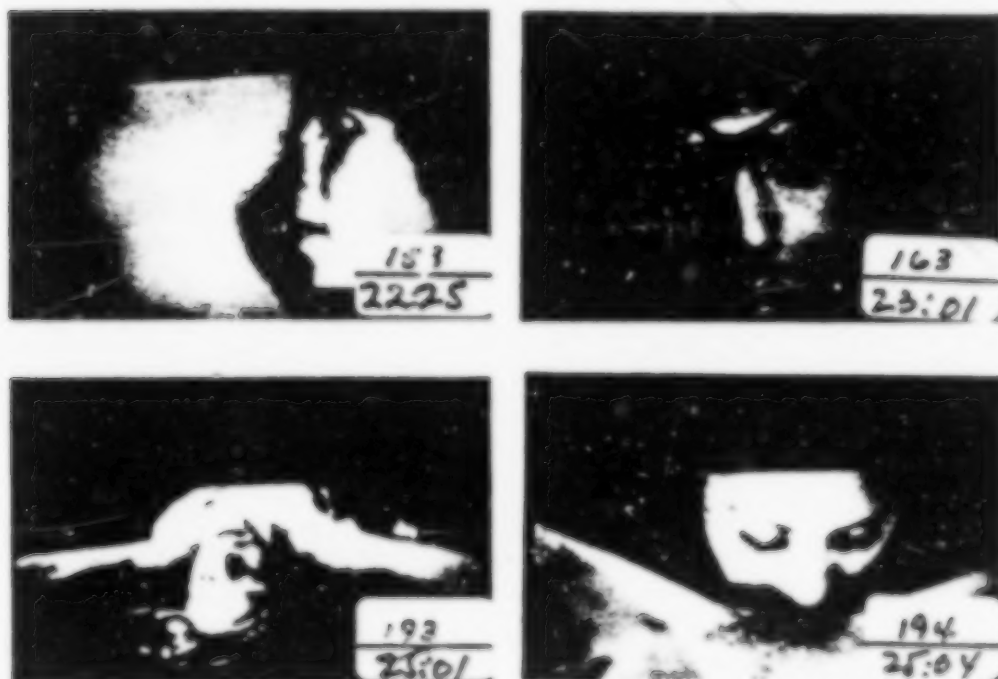
legs and arms outstretched /122/ in a standing position. The female attendants then begin carressing and sucking her body /124/ in the sensual areas,



as the camera in varied and diverse angles focuses on a female performing cunnilingus /125/. The girl being fondled has a look of fright and dismay /128/ which gives way to passive



acceptance. Heavy breathing is heard /153/ of all participants in the /163/ acts. /193-194/



/204-211-213-220-235-237/



The camera returns again to the spotlighted green door.

SCENE XI /238/



Black man enters through the door. /240/

His upper torso is nude. He is wearing white stretch pants, cut out exposing his erect black penis.



/244/ As bongos sound in the background, the black man walks deliberately /246/ toward the young girl, who is



now lying prone, with her rectal and vaginal areas fully exposed and open to a frontal view.

The camera focuses directly on her vagina. /248-251/



The black man moves toward the prostrate girl as the several women attendants hold her. As the man approaches the reclining girl, the attendants beckon him on, pointing to her vagina, encouraging him to indulge. The man kneels, places his palms on her groin area, right and left, then slowly places his mouth on her vagina /258/ and begins cunnilingus. /262/

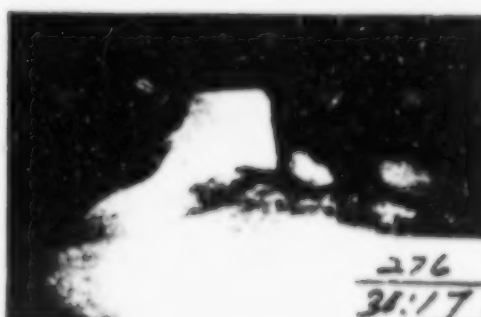


The close proximity of the camera to the act graphically depicts the act of cunnilingus.

/264/

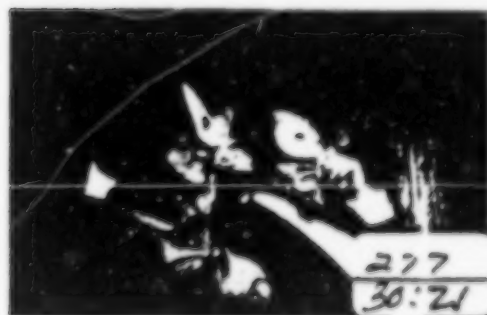


/268-272-273-276/



Sounds heard after the bongo music is no longer audible are "WOW . . . WOW!"

This activity continues for several minutes, during which various closeups of the audiences masturbating as they watch, are shown. Moans and heavy breathing are heard. /277/ /278/

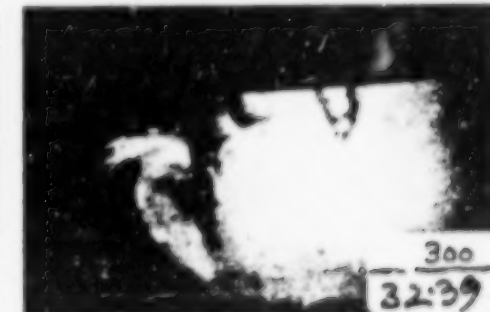


The black man directs his penis (closeup)

/280/ towards the girl's vagina, /282/



penetrates and begins intercourse while tonguing her mouth. /290/ He performs /300/ sexual intercourse to the beat of a bongo drum.



As he speeds up, /318/ so also does /329/



D-24

the tempo 334 of the bongo 340 beat.



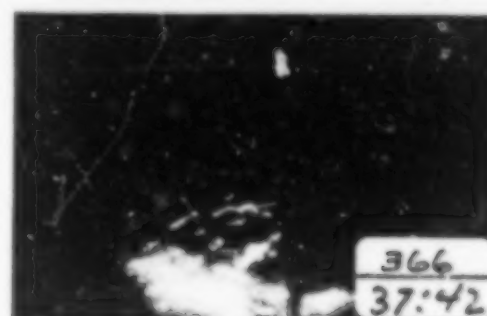
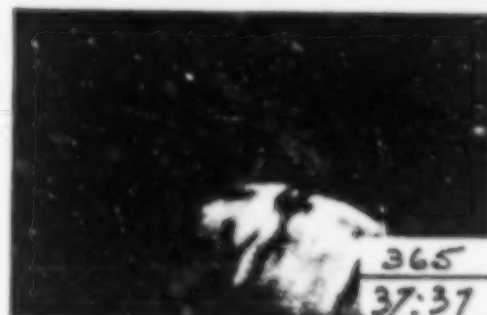
The girl becomes 356 ecstatic and raises her legs up around the man's hips. 361



365 Her ecstatic sighs and screams increase in intensity and loudness and culminate in her sexual climax.

366

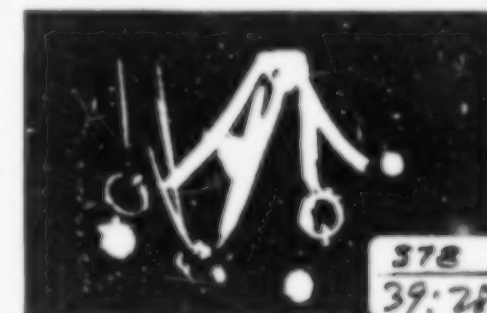
The black man withdraws his penis as camera closeup fills most of the movie screen.



D-25

SCENE XII 378

Appearing on the screen, a trapeze type harness device with circular openings at the ends descends from the ceiling by a rope and is lowered to stage level.



Three men mount the device 382 and allow the cylindrical 383 appendages to support their



lower buttocks. Their genitals are fully exposed.

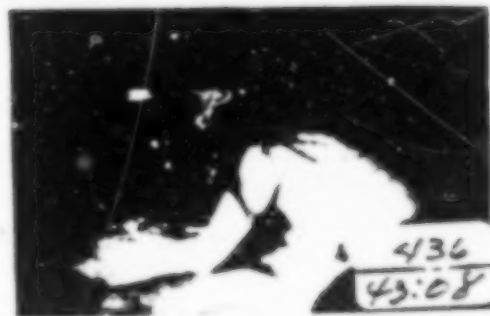
393 The girl is carried toward the three men, vaginal area and rectum directly in front of the viewer.



403 She is lowered into position so her mouth is in front of the black man's penis. She copulates him orally while her two arms are raised so as to grasp the penis of the man on her right with her right hand and the penis of the man at the left with her left hand. She begins simultaneously to perform 417 oral sodomy while masturbating 426 the other two. Another man



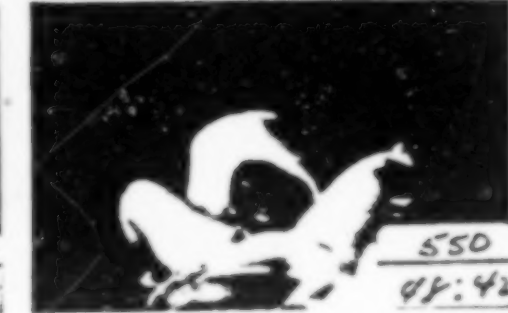
is placed below the girl and penetration into her vagina is made, completing 436 the quadrasexual act of oral sodomy, masturbation and sexual intercourse all at one

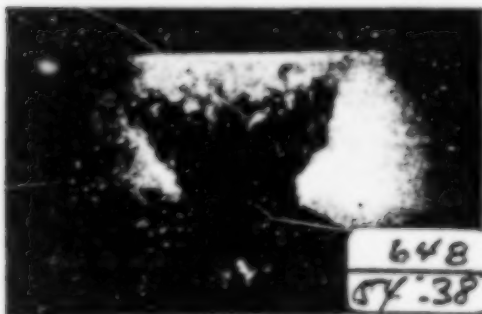
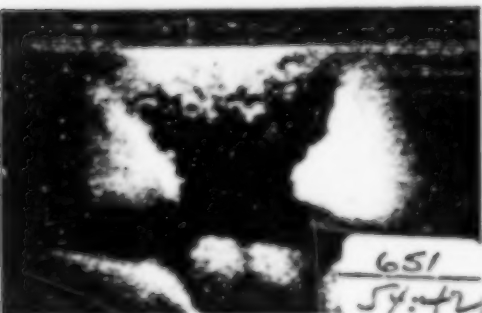


time. 474 477

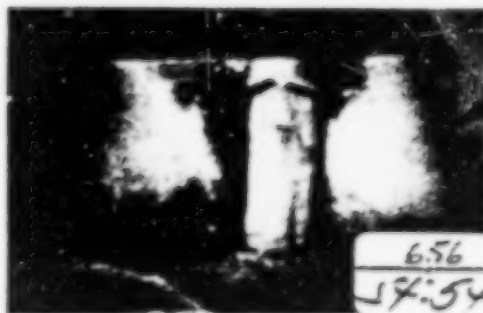


Within the same room 484 acts of group sex take place. Two and three doing various acts at once - e.g., one party, anal sodomy, while the party being sodomized performs cunnilingus. 510-539-543-550



555 625648 Full closeup of penis 650 -651-655 repeatedly entering the vagina totally

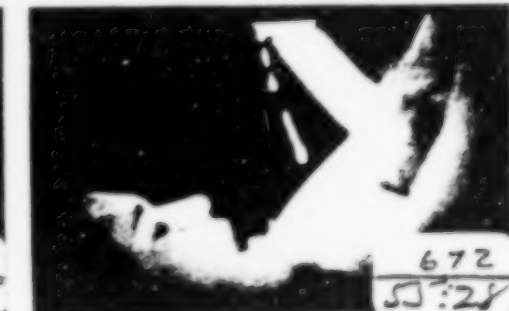
filling the screen
as sighs and moans
are heard. 656



The penis is withdrawn as semen is seen to
ejaculate in throbbing fashion. 658-661-662-666



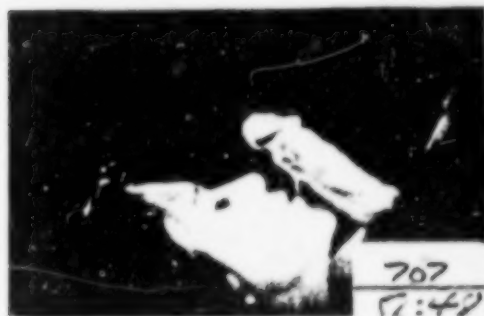
After this display, a slow motion process
takes place where the girl is positioned directly
670 below a fully 672 erected penis, - in



slow motion and with strange, unusual high-pitched

D-30

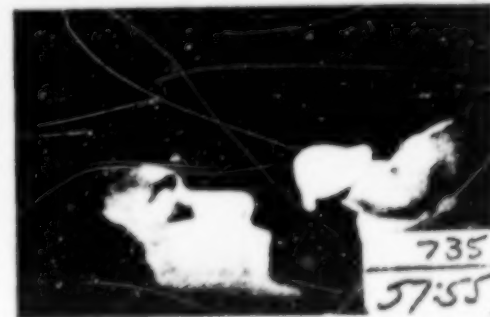
sound in background 707 708 - the climax is



attained and semen is ejaculated into the woman's face and open mouth. The emission (in slow motion) spurts out of the end of the penis, flowing 721 down over the testicles and into the woman's face and mouth. This spectacle 725 is repeated

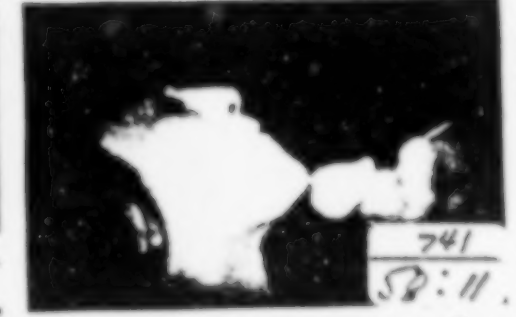


over and over, fully enveloping the screen. The man then takes 733 his penis by the hand and wipes 735 the semen all over the girl's face

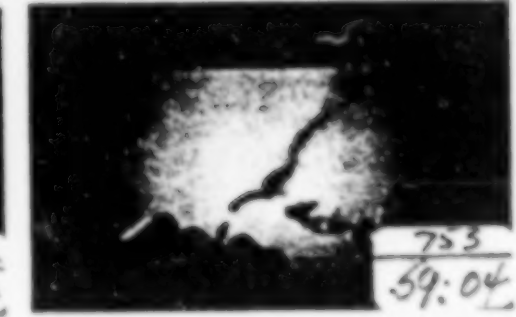
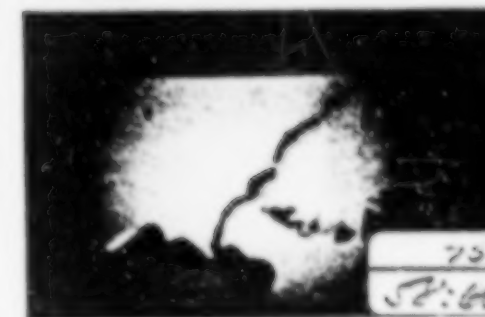


D-31

and neck. 737 741



Then follows a sequence of negative exposures of semen dripping 752 into the female's mouth and 753 another shot of the substance pouring into



the female's mouth in a thick stream. 789 790



Younger man of the two men in Scene VI dashes to the stage, picks up the girl who was featured, and carries her off quickly

D-32

behind the green door. /801/



SCENE XIII /802/

(Back in the diner)

OLDER MAN: "He (indicating the other younger man seated on his right) went through the



green door that was the last I saw of him."

MANAGER: "Well, what happened, Ed? Huh?"

YOUNG MAN: "Some other time, Kish - see ya around buddy." (Exits)

OLDER MAN: "O.K. Boo Boo - goodnight."

SCENE XIV

(Younger man is driving truck, day-dreaming. The young woman appears again—lying down facing a penis, /812/ which she commences to



D-33

/819/ orally copulate. /826/



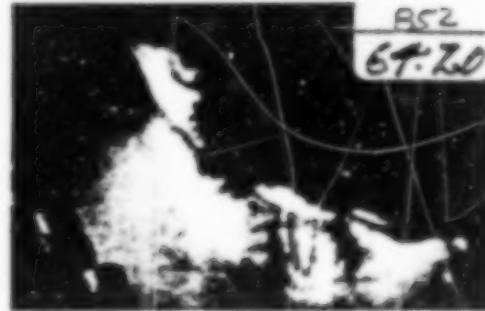
/833-840-846-847/



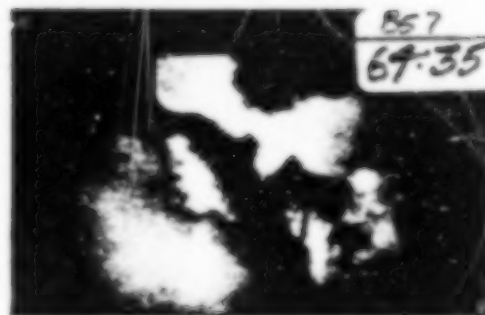
D-34

Young man performs cunnilingus.

/850/ Full screen view of the vaginal area as male commences cunnilingus. /851/ /852/



/854-857-859-864/



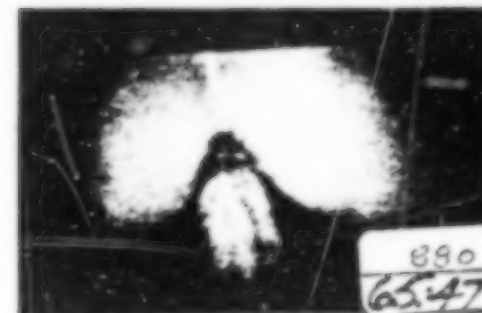
D-35

Repeated shots of penis penetrating the vagina.

/877/



Full /880/ closeup /881/ filling the screen.



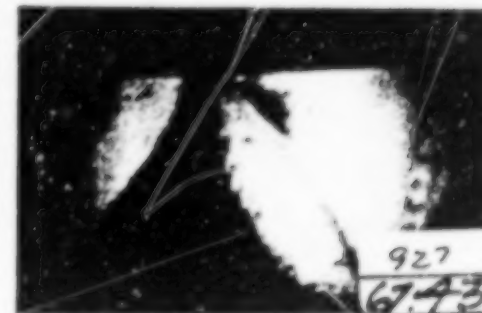
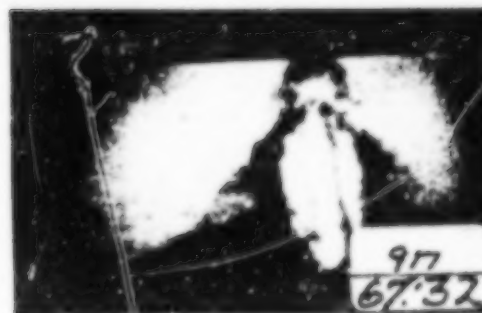
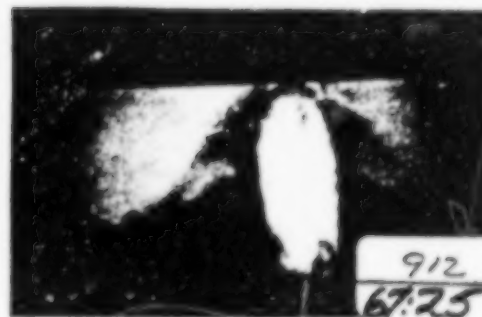
View of man, mouth to mouth, tongue to tongue, with the young woman. Heavy sighing.

/895/ /898/



D-36

902-912-917-927



Short breathing, heavy and deep. END.

TRAILER showing scenes 965 of preceding sexual activities, 993 orgies,



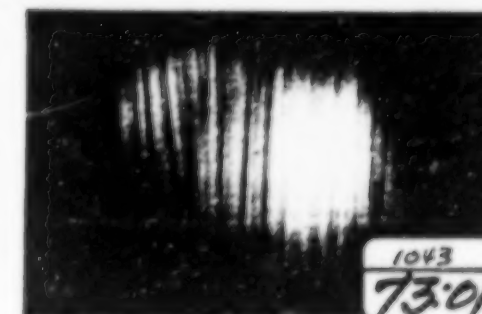
D-37

1002 ejaculation into girl's face, lesbianism, oral copulation, cunnilingus, as credits appear.

1026-1027-1031



1037-1040-1043



APPENDIX E

Time and Motion Study
For the Motion Picture Film
"Behind the Green Door"

. 15 pages
(1043 photos)

Reference: Amicus Curiae Brief at page 64,
footnote 13.



(1) FILM TITLE - BEHIND THE GREEN CURTAIN. (2-10) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (11-15) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (16-20) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (21-25) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (26-30) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (31-35) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (36-40) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (41-45) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (46-50) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (51-55) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (56-60) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (61-65) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (66-70) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (71-75) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (76-80) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (81-85) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (86-90) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (91-95) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (96-100) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM.

(101-105) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (106-110) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (111-115) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (116-120) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (121-125) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (126-130) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (131-135) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (136-140) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (141-145) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (146-150) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (151-155) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (156-160) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (161-165) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (166-170) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (171-175) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (176-180) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (181-185) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (186-190) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (191-195) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM. (196-200) TWO MEN SEATED IN DINER. TALK WITH CHIEF AS WITNESS REPORT THEM.



THESE ARE THE STILLS FROM THE FILM "THE DANCER" WHICH WAS SHOT IN 1964. THE FILM WAS SHOT IN 16MM AND THE STILLS WERE PRINTED IN 35MM.

THESE ARE THE STILLS FROM THE FILM "THE DANCER" WHICH WAS SHOT IN 1964. THE FILM WAS SHOT IN 16MM AND THE STILLS WERE PRINTED IN 35MM.





1411-1412 ACTIVITY CONTINUED - NO DISAGREEMENT. FELLED ORAL COPULATIONS, NASTROPHICATION, ORAL INTERACTIONS, COMBINATION OF THESE PERIODS.



1413-1414 ACTIVITY CONTINUED - NO DISAGREEMENT. FELLED ORAL COPULATIONS, NASTROPHICATION, ORAL INTERACTIONS, COMBINATION OF THESE PERIODS.



601-660: SEVERAL INTERMEDIATE, HIGH-ANGLE MOTION OF TRUNK BY MALE. 601-610: SEVERAL MOTION OF TRUNK, 611-620: SEVERAL MOTION OF TRUNK, 621-630: SEVERAL MOTION OF TRUNK, 631-640: SEVERAL MOTION OF TRUNK, 641-650: SEVERAL MOTION OF TRUNK, 651-660: SEVERAL MOTION OF TRUNK.



661-720: SEVERAL MOTION OF TRUNK BY MALE. 661-670: SEVERAL MOTION OF TRUNK, 671-680: SEVERAL MOTION OF TRUNK, 681-690: SEVERAL MOTION OF TRUNK, 691-700: SEVERAL MOTION OF TRUNK, 701-710: SEVERAL MOTION OF TRUNK, 711-720: SEVERAL MOTION OF TRUNK.



(61-741) PENIS EJACULATES INTO MOUTH OF FEMALE. MALE HOLDS PENIS TO MOUTH OF FEMALE. FEMALE GRINS WITH AN OPEN MOUTH AS MALE HOLDS PENIS TO HER MOUTH. MALE GRINS INTO IT. HE PUTS PENIS AGAINST HER NOSE, MOUTH AND CHIN. (741-760) FILM PROJECTION IS REVERSED TO CREATE IMAGE IN NEGATIVE FASHION SHOWING SEMEN SPONTANEOUSLY FROM PENIS AND FLOWING INTO MOUTH OF GIRL. (761-780) FILM REVERTS TO REGULAR PROJECTION. PENIS EJACULATES SEMEN IN FACE OF GIRL. GIRL LICKS SEMEN FROM PENIS.

(781-795) GIRL LICKS PENIS. (781-795) GIRL LICKS PENIS. (796-810) GIRL LICKS PENIS. (811-825) GIRL LICKS PENIS. (826-840) GIRL LICKS PENIS. (841-855) GIRL LICKS PENIS. (856-870) GIRL LICKS PENIS. (871-885) GIRL LICKS PENIS. (886-900) GIRL LICKS PENIS. (901-915) GIRL LICKS PENIS. (916-930) GIRL LICKS PENIS. (931-945) GIRL LICKS PENIS. (946-960) GIRL LICKS PENIS. (961-975) GIRL LICKS PENIS. (976-990) GIRL LICKS PENIS. (991-1000) GIRL LICKS PENIS.



(67:50-68:50) CUNILINUS. (67:50-68:50) SEXUAL INTERCOURSE GIRL ON TOP. FULL SCREEN CLOSEUP OF VAGINAL PENETRATION. (68:50-69:50) SEXUAL INTERCOURSE GIRL BENEATH MALE.



(69:50-70:50) SEXUAL INTERCOURSE MALE ON TOP. (69:50-70:50) MALE APPEARS AS AT THE BEGINNING. CLOSING CREDIT ROLL.



(1009-1043) CREDITS CONTINUE ALONG WITH SELECTED SCENES OF PREVIOUS SEXUAL ACTIVITY AND ORGIES. THE END.

Reference: See Brief Amicus Curiae at page 67 and 68
footnote 14.

HANS CHRISTIAN ANDERSEN

FAIRY TALES

TRANSLATED BY
Marie-Louise Peulevé

ILLUSTRATIONS BY
Svend P. Jørgensen



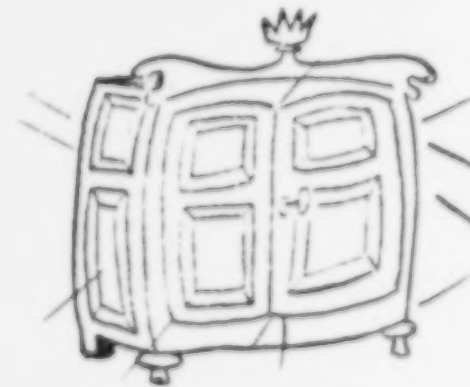
SKANDINAVISK BOGFORLAG

The Emperor's New Clothes

Many years ago there was an Emperor who was so extremely fond of beautiful new clothes that he spent all his money on being superbly dressed. He took no interest in his army and it was only to show off his new clothes that he went to the theatre

or for a drive in the country. He had a garment for every hour of the day, and just as you may say of a king, "He's in his council," it was always said of this Emperor, "He's in his wardrobe".

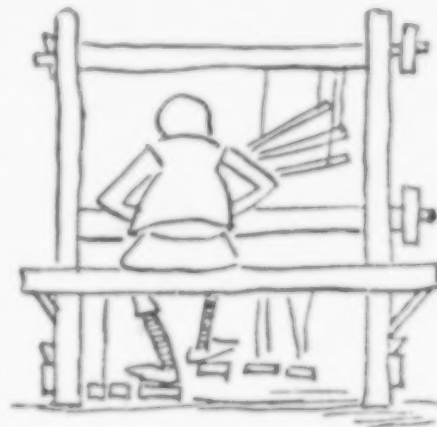
The big city, where he lived, was full of life and activity, and strangers were continually arriving. One day two swindlers turned up; they pretended to be weavers and claimed that they knew how to weave the most beautiful



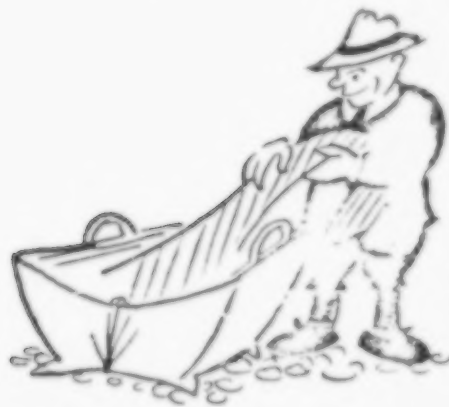


materials imaginable. Not only were shades and patterns of a rare beauty, but the clothes made from this fabric had the strange quality of being invisible to any person who wasn't fit for his position or else was stupid beyond excuse.

"Why! They must be wonderful clothes," said the Emperor to himself, "wearing them I could find out if any of the men I employ are unfit for their post, and I can distinguish between the clever and the stupid. Yes, they must weave that cloth for me at once." Then he gave them a lot of money in advance so that they could begin to work.



At once they put up two looms and pretended to be working, though in fact the loom was quite empty. They had the cheek to demand the purest silk and the costliest gold thread, which they tucked away in their own bags, and then set to work on the empty looms and that until the small hours of the night.



"Now I should like to know how they are getting on with the cloth," thought the Emperor, but he did feel rather ill at ease knowing that those who were stupid or unfit for

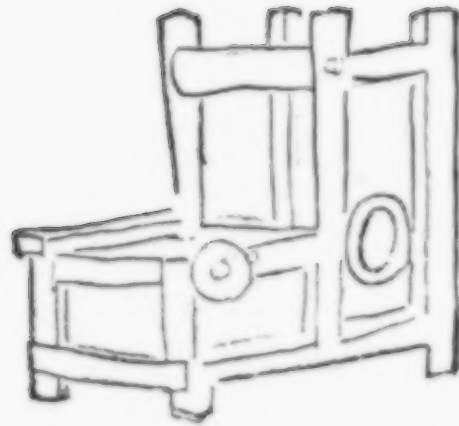
their post wouldn't be able to see it. Still, for his own part he was confident that he didn't need to worry, but all the same he would rather send someone else first to see how things were. All over the town people knew about the magic power of this cloth, and they were all keen on seeing how incapable or stupid their neighbours were.



"I'll send my honest old premier to the weavers," thought the Emperor, "he's the best one to see what the material looks like, for he's clever, and nobody could be better suited to his post than he is."

Now the kind old premier entered the hall where the two swindlers sat working the empty looms. "Good gracious me!"





thought the old premier opening his eyes wide, "I can't see anything."

But of course he didn't say so.

The two swindlers invited him to inspect the loom and asked if he didn't find the colours and the design quite perfect? They pointed to the empty loom, and the poor

old premier opened his eyes even wider than before, but he couldn't see anything — for there wasn't anything to be seen. "Dear me," he thought, "Could I really be stupid? I never thought so, no one must get to know! Could it be that I am not fit for my post? No, it'll never do to tell them that I can't see the cloth."

"Well, what is your opinion?" asked the one who was pretending to weave.



"Oh, it's so pretty, quite ravishing," said the old premier looking through his glasses, "what a design and what colours! Indeed, I'll tell the Emperor that I'm very satisfied."

"Ah, we're pleased to hear that," said the two weavers, and now they named the colours and explained the un-



sual design. The old premier listened carefully that he might be able to repeat everything to the Emperor, and so he did.

Now the swindlers demanded more money, and more silk, and more gold thread; they needed it for the weaving. Everything went straight into their own pockets, not a thread was placed in the loom, but still they continued as before, working the empty loom.

Soon after the Emperor sent another honest official to see how the weaving was getting on, and whether the cloth would be ready soon. He had the very same experience as the premier, he looked and looked, but as there was nothing but the empty



looms, he saw nothing. — "Look, isn't it an attractive piece of cloth?" asked the two swindlers, and they carefully explained the magnificent design which wasn't there at all.

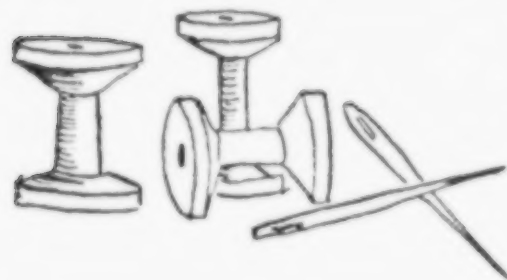
"I know I'm not stupid," thought the man, "so it must be my good position I'm unfit for. That's very strange, but I mustn't let anyone know." So he praised the cloth that he didn't see, and he expressed his delight in the beautiful colours and the wonderful design. "Yes, it is unbelievably lovely," he told the Emperor.

The whole town was now discussing this splendid material.

Now the Emperor decided to see it himself, while it was still in the loom. Together with several select people — among them the two honest, old officials who had been there before — he went to see the cunning swindlers who were now weaving with all their might, but still without thread.



"Look, isn't it magnificent?" said the two honest officials.

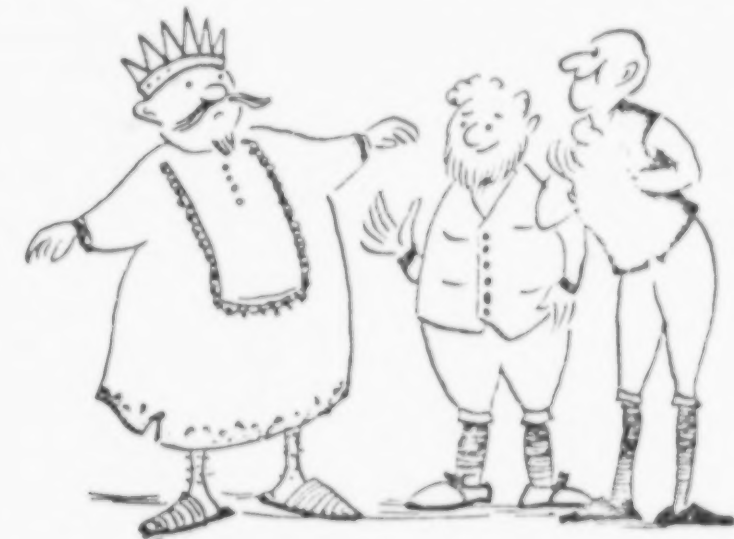


"Have Your Majesty seen the pattern, the colouring!" Then they pointed to the empty loom, because they thought that all the other people could see the material.

"What ever is this?" thought the Emperor, "I can't see a thing! This is terrible, am I really stupid? Am I not fit to be Emperor? This is the most frightful thing that



could happen to me!" — "Why yes, it is very beautiful," the Emperor said, "it has my imperial approval." And he gave a benevolent nod as he looked at the empty loom; he wouldn't admit that he couldn't see anything. His entire escort gazed and gazed, but they made no more of it than all the others, but like the Emperor they all exclaimed, "How very beautiful!" Now they advised him to have a garment cut from this wonderful material and wear it for the first time in the grand procession that was to take place very soon. "It's magnificent, superb, out-





standing!" they all said to one another, and they were all incredibly pleased with it. The Emperor conferred a knighthood on each of the swindlers and gave them a cross to wear in their button-

holes as well as title of Imperial Weavers.

The entire night preceding the procession the swindlers sat working with more than sixteen candles lit. People could see they were busy getting the Emperor's new clothes ready. They pretended to take the material off the loom, they cut away at the air with big scissors, and they sewed with needles without thread, and at last they declared, "Look! The clothes are all ready now."



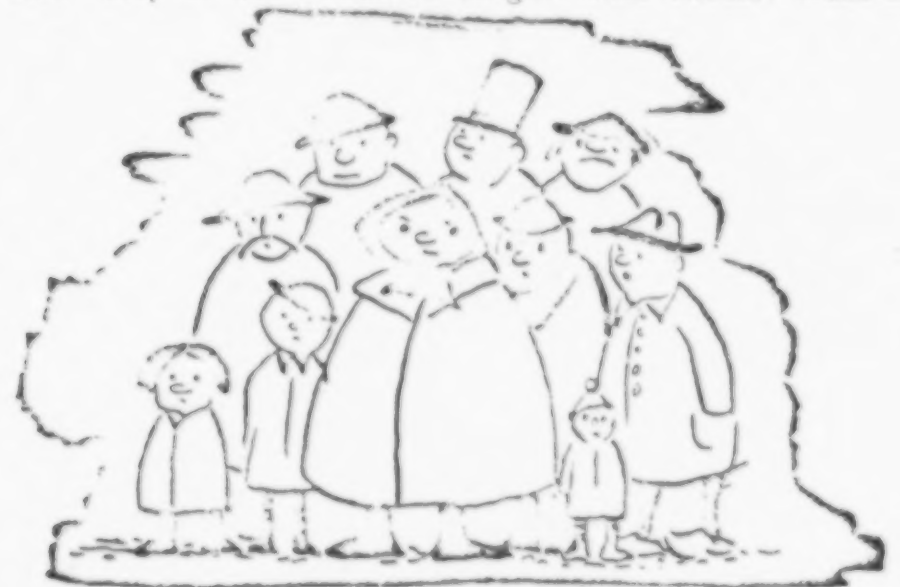
The Emperor went personally to the weavers escorted by the most distinguished courtiers, and the two swindlers each held out their arm as if they were holding something and said, "Look, here are the breeches — here is the robe — here is the mantle." And so on. "They are all as light as gossamer, you can hardly feel that you are wearing anything, but that's just the fine thing about them.

"To be sure", said all the courtiers, but they couldn't see a thing, for there wasn't a thing to be seen.

"If now Your Imperial Majesty most graciously will take off your clothes," the swindlers said, "then we'll fit you with the new ones in front of the big looking-glass."

The Emperor took off his clothes, and the swindlers pretended to hand him one by one the new garments they were supposed to have made, and they pretended to be fastening something at his waist — it was the train, and the Emperor turned and twisted in front of the glass.

"Heavens, how well they suit Your Majesty, and what a perfect cut!" they all said. "What a design! What colours! What a



precious garment!" — "They are waiting outside with the canopy that is to be carried above Your Majesty in the procession," announced the Master of Ceremonies.

"Good", said the Emperor, "I'm quite ready." "Isn't it a perfect cut?" And he turned round once more in front of the glass to give them the impression that he really was admiring his fine garment.

The chamberlains who were to carry the train fumbled about on the floor as if they were picking up the train. They walked along with outstretched hands in order to hide the fact that they couldn't see anything.

Now the Emperor was walking in the procession under the beautiful canopy, and all the people in the street and at the windows cried, "Goodness, how the Emperor's new clothes look marvellous! What a splendid train on his mantle! What a perfect fit!" Nobody would admit that he didn't see anything, because that was as good as saying that he wasn't fit for his job or else that he was stupid. Never before had the Emperor's clothes been such a success.

"But he hasn't got anything on!" cried a little child. "Gracious me, did you hear what this innocent child said?" exclaimed the father, and they whispered from one to the other what the child had said.

"He hasn't got anything on! A little child is saying that he hasn't got anything on!"

"Why! He hasn't got anything on!" everybody shouted at last. The Emperor felt terribly embarrassed, for it seemed to him that people were right, but he thought to himself, "I've got to go through with the procession." And he carried himself even more proudly, and his chamberlains walked behind him carrying the train that wasn't there.